



**THE JUDGE ADVOCATE GENERAL'S CORPS,
1982-1987**

Thomas J. Feeney and Captain Margaret L. Murphy

**THE NATO STATIONING AGREEMENTS IN THE
FEDERAL REPUBLIC OF GERMANY: OLD LAW
AND NEW POLITICS**

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BOOK REVIEWS

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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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Footnotes also must be typed double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (14th ed. 1986), copyrighted by the *Columbia, Harvard, and University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 4th ed. 1988)(available through the Defense Technical Information Center, ordering number AD B124193). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of grade or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

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The Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

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THESIS TOPICS OF THE 36TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

Fourteen students from the 36th Judge Advocate Officer Graduate Course, which graduated in May 1988, participated in the Thesis Program. The Thesis Program is an optional part of the LL.M. curriculum. It provides students an opportunity to exercise and improve analytical, research, and writing skills, and, equally important, to produce publishable articles that will contribute materially to the military legal community.

All graduate course theses, including those of the 36th Graduate Course, are available for reading in the library of The Judge Advocate General's School. They are excellent research sources. In addition, many are published in the *Military Law Review*.

Following is a listing, by author and title, of the theses of the 36th Judge Advocate Officer Graduate Course:

Major Sadi Cayci, *U.S. Security Assistance and Foreign Military Sales*.

Captain Edwin S. Castle, *Regulation of Military Members' Political Activities*.

Captain Benjamin P. Dean, *Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model*.

Captain David W. Engel, *Quality Assurance in Military Hospitals: A Proposal for Reform*.

Captain John W. Fomous, *Federal Supremacy and Sovereign Immunity in Environmental Law: What's Left and How to Fix It*.

Captain Shawn T. Gallagher, *Due Process Standards and Considerations Regarding Suspension and Debarment*.

Captain Mark W. Harvey, *Early Pursuit of Justice: Extraordinary Writs and Government Appeals to the Military Appellate Courts*.

Captain David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*

Captain Lawrence D. Kerr, *Admissibility of Evidence from Compelled Mental Examinations: MRE 302 and Beyond*.

Captain Scott E. Ransick, *Adverse Impact of the Federal Bankruptcy Laws on the Government's Rights in Relation to the Contractor in Default*.

Captain Elyce K. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition On or Near the Battlefield*.

Captain Ronald W. Scott, *Protecting United States Interests in Antarctica*.

Captain Michael R. Snipes, *Re-Flagged Kuwaiti Tankers: **The** Ultimate Flag of Convenience for an Overall Policy of Neutrality*.

Captain Manuel E.F. Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?*

PROFESSIONAL WRITING AWARD FOR 1987

Each year, the Association of Alumni of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The Professional Writing Award acknowledges outstanding legal writing and is designed to encourage authors to add to the body of scholarly legal writing available to the legal community. The award consists of a citation signed by The Judge Advocate General, an engraved plaque, and a set of quill pens.

The recipient of the 1987 award is Major Stephen E. Deardorff for his article, "Informed Consent, Termination of Medical Treatment, and the Federal Tort Claims Act—A New Proposal for the Military Health Care System," which appeared at 115 *Mil. L. Rev.* 1 (1987). The article includes an exhaustive examination of the informed consent doctrine as the basis for a well-founded criticism of current deficiencies in military medico-legal practice. Major Deardorff concludes with a thoughtful proposal for a uniform military standard for informed consent. The *Military Law Review* is proud to add its congratulations to Major Deardorff.

THE ARMY JUDGE ADVOCATE GENERAL'S CORPS. 1982-1987

by Thomas J. Feeney[“] and Captain Margaret L. Murphy^{*}

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THE ARMY JUDGE ADVOCATE GENERAL'S CORPS, 1982-1987""""

I. INTRODUCTION

In 1975, as part of the United States Army bicentennial celebration, The Judge Advocate General's Corps published an official history of the first two hundred years of the Corps.¹ The history traced the development of American military law from its origins in the American Revolution to the end of the Vietnam conflict. To keep that history current, the *Military Law Review* will periodically publish updates that record the significant events affecting the Corps. The first update appeared in 1982, covering the years from 1975 to 1982.² This is the second; it brings the history current to 1987.

From 1982 to 1987 the Corps continued its tradition of providing total legal support to commanders and the individual soldiers. The tragedy at Gander, Newfoundland³ and the military operation in Grenada⁴ illustrate the breadth of modern military legal practice, from operational law in combat to civil litigation on behalf of dependent families. *The Army Judge Advocate General's Corps, 1982-1987*

"Associate. Duane, Morris & Heckscher, Philadelphia, Pennsylvania. Member of U.S. Army Judge Advocate General's Corps, 1978-1988. Major Feeny's assignments included Editor, Military Law Review, The Judge Advocate General's School, 1986-1988; Branch Chief, Defense Appellate Division, 1983-1985; Litigation Division, 1980-1983; and Office of the Staff Judge Advocate, Ft. Lee, Virginia, 1978-1980. S.B., Massachusetts Institute of Technology, 1975; J.D. (cum laude), University of Pennsylvania Law School, 1978. Author of *Expert Psychological Testimony on Credibility Issues*, 115 Mil. L. Rev. 121 (1987); *The Complainant's Credibility: Expert Testimony and Rape Trauma Syndrome*, The Army Lawyer, Sept. 1985, at 33. Member of the bars of Pennsylvania, U.S. Court of Appeals for the Fourth and Tenth Circuits, U.S. Court of Military Appeals, U.S. Army Court of Military Review, and the U.S. Supreme Court.

*Judge Advocate General's Corps, U.S. Army. Currently assigned as Legal Assistance Officer. 2d Armored Division (Forward), Federal Republic of Germany. B.A., Valparaiso University, 1978; J.D., Valparaiso University School of Law, 1987. Member of the bars of Indiana and the U.S. Army Court of Military Review. Captain Murphy assisted in writing this article while assigned temporarily to the Developments, Doctrine, and Literature Department of The Judge Advocate General's School prior to attending the 166th Judge Advocate Officer Basic Course.

***The authors compiled this history after receiving numerous submissions from throughout the Judge Advocate General's Corps. The authors wish to thank all officers who submitted information to be included in this historical update. Without these submissions, this history would not be as complete as it is, and valuable information would have been lost and forgotten over the years.

The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975 [hereinafter 1975 History].

¹Park, *The Army Judge Advocate General's Corps, 1975-1982*, 96 Mil. L. Rev. 5 (1982).

²See *infra* text accompanying notes 48 to 57.

⁴See *infra* text accompanying notes 22 to 47.

discusses these and other developments in organization, mission, and personnel that will become part of the permanent history of the Corps.

11. GENERAL OFFICERS ON ACTIVE DUTY, 1982-1987

This update continues the practice of summarizing the JAG Corps' general officer personnel changes, and of providing biographical information on those promoted to general officer since the last historical update article.

Major General Hugh J. Clausen held the position of The Judge Advocate General from August 1, 1981, until he retired on July 31, 1985.⁵ Major General Clausen was succeeded by Major General Hugh R. Overholt (August 1, 1985 to present).

Major General Overholt was The Assistant Judge Advocate General until he became The Judge Advocate General.⁶ On August 1, 1985, Major General William K. Suter became The Assistant Judge Advocate General.

The position of Judge Advocate, U.S. Army Europe and Seventh Army was held by Brigadier General Richard J. Bednar from June 1981 to June 1983.⁷ Brigadier General Ronald M. Holdaway then served in this position from 1983 to 1987.⁸ Brigadier General Dulaney L. O'Roark, Jr. currently holds this position.

Brigadier General Lloyd K. Rector was the Assistant Judge Advocate General for Military Law from 1981 until he retired on June 30, 1984.⁹ Brigadier General Donald W. Hansen began his tenure in this position on July 3, 1984.¹⁰

Brigadier General Holdaway was the Assistant Judge Advocate General for Civil Law from July 1981 to 1983. Brigadier General Bednar filled this position from June 1983 until he retired on June 30, 1984. Brigadier General John L. Fugh filled the vacancy created by Brigadier General Bednar's retirement and continues to hold this position to the present time.

Since 1981, four individuals have held the position of Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court

⁵General Clausen's biographical sketch appears in Park, *supra* note 2, at 11.

⁶General Overholt's biographical sketch appears in *id.* at 16.

⁷General Bednar's biographical sketch appears in *id.* at 19.

⁸General Holdaway's biographical sketch appears in *id.* at 21.

⁹General Rector's biographical sketch appears in *id.* at 20.

¹⁰General Hansen's biographical sketch appears in *id.* at 24.

of Military Review. From December 1, 1981, to June 30, 1984, Brigadier General Hansen filled this post. Brigadier General Suter served in this position from July 3, 1984, to July 31, 1985. On August 30, 1985, Brigadier General O'Roark became the Commander, USALSA, and Chief Judge. He remained in this position until 1987, when Brigadier General Holdaway replaced him.

A. MAJOR GENERAL WILLIAM K. SUTER

Major General William K. Suter became The Assistant Judge Advocate General on August 1, 1985. He succeeded Major General Hugh R. Overholt, who became The Judge Advocate General. From July 1984 until 1985, General Suter served as the Commander, U.S. Army Legal Services Agency, and Chief Judge, U.S. Army Court of Military Review. From March 1981 to June 1984, General Suter was Commandant of The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia.

General Suter's previous assignments include service as Director, Academic Department and Deputy Commandant, TJAGSA; Chief of the Personnel, Plans, and Training Office, OTJAG; instructor in the Military Affairs (now Administrative and Civil Law) Division, TJAGSA; Staff Judge Advocate of the 101st Airborne Division (Air Assault), Fort Campbell, Kentucky; Deputy Staff Judge Advocate, United States Army, Vietnam; Staff Judge Advocate, U.S. Army Support Command, Thailand; and Assistant Staff Judge Advocate, U.S. Army, Alaska.

General Suter received his undergraduate degree from Trinity University in San Antonio, Texas, and his law degree from Tulane School of Law in New Orleans, Louisiana. He is a graduate of the Industrial College of the Armed Forces and of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas. During the academic year 1966-67, General Suter completed the 15th Judge Advocate Officer Advanced Course at TJAGSA, Charlottesville, Virginia.

B. BRIGADIER GENERAL JOHN L. FUGH

In July 1984 Brigadier General John L. Fugh became Assistant Judge Advocate General for Civil Law, succeeding Brigadier General Richard J. Bednar, who retired.

General Fugh served as Chief, Litigation Division, Office of The Judge Advocate General, from July 1982 to June 1984. From July 1979 to July 1982 he served as Special Assistant to the Deputy Assistant Secretary of Defense. His other assignments include service as

Staff Judge Advocate of the 3d Armored Division, Frankfurt, Germany; Legal Counsel to the Program Manager, U.S. Ballistic Missile Defense Program Office, Office of Chief of Staff, Department of the Army; Staff Judge Advocate of the Military Assistance Advisory Group, Taipei, Taiwan; Deputy Staff Judge Advocate and Chief, Civil Law, U.S. Army Vietnam; Assistant Judge Advocate, U.S. Army Europe; and Assistant Judge Advocate of the Sixth U.S. Army, Presidio of San Francisco, California.

General Fugh received his undergraduate degree from Georgetown University and his J.D. degree from George Washington University. He has also attended the Basic and Advanced Courses at The Judge Advocate General's School; the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas; the U.S. Army War College, Carlisle Barracks, Pennsylvania; and the Executive Program for Senior Defense Managers, Harvard University.

General Fugh was born in Beijing, China, and is the first Chinese-American to attain the rank of general officer in the JAG Corps.

C. BRIGADIER GENERAL DULANEY L. O'ROARK

In September 1985 Brigadier General Dulaney L. O'Roark became Commander, U.S. Army Legal Services Agency, and Chief Judge, U.S. Army Court of Military Review, succeeding Major General William K. Suter, who became The Assistant Judge Advocate General. In July 1987 General O'Roark assumed his current position as Judge Advocate, U.S. Army Europe and Seventh Army.

General O'Roark served as Commandant, The Judge Advocate General's School (TJAGSA), from June to August 1985. From 1981 to 1985 he was the Staff Judge Advocate, III Corps, Fort Hood, Texas. General O'Roark's other assignments include Executive, Office of The Judge Advocate General (OTJAG); Chief of the Personnel, Plans and Training Office, OTJAG; Staff Judge Advocate, 8th Infantry Division (Mechanized), U.S. Army Europe; and Chief of the Administrative and Civil Law Division, TJAGSA.

During his career, General O'Roark has attended both the Basic and Advanced Courses at TJAGSA; the U.S. Army Command and General Staff College; and the Industrial College of the Armed Forces, Fort McNair, Washington D.C. General O'Roark received both his undergraduate and J.D. degrees from the University of Kentucky.

111. REGIMENTAL ACTIVATION

On July 29, 1986, the Corps' 211th birthday, The Judge Advocate General's Corps was officially activated into the U.S. Army Regimental System." The formal activation ceremony took place on October 9, 1986, during The Judge Advocate General's Conference and Annual Continuing Legal Education Program at The Judge Advocate General's School in Charlottesville, Virginia.¹²

The Regimental System encompasses the total Army, including the Active and Reserve Components. By providing an opportunity for affiliation, it develops loyalty and commitment, improves unit esprit, and institutionalizes the war-fighting ethos.¹³ The Army Chief of Staff approved the regimental concept in 1981. He approved the JAG Corps regimental plan and authorized its implementation under the Regimental System in January 1986.

The Regiment retained the title, "The Judge Advocate General's Corps," and the Judge Advocate General's School became the home of the Regiment.¹⁴ All JAG Corps personnel, officer, warrant, and enlisted, are affiliated with the Regiment. The Judge Advocate General is the Commander of the Regiment, and The Assistant Judge Advocate General is the Assistant Commander. The Executive, Office of The Judge Advocate General (OTJAG), is the regimental Chief of Staff. Finally, the Chief, Personnel, Plans and Training Office, OTJAG, and the Corps Sergeant Major are the regimental Personnel Officer and Sergeant Major, respectively.¹⁵

The Regiment has two honorary positions, the Honorary Colonel of the Corps and the Honorary Sergeant Major of the Corps. The Honorary Colonel of the Corps must be a distinguished retired commissioned officer in the grade of colonel or above who served in The Judge Advocate General's Corps. The honorary Sergeant Major of the Corps must be a distinguished retired noncommissioned officer in the grade of sergeant first class or above who served in the Corps." Both serve for three-year renewable terms. They carry out ceremonial duties, such as attending Corps functions and delivering speeches on the his-

"General Orders No. 22, Headquarters, Dep't of Army 130 May 1986), *reprinted in* The Army Lawyer, Aug. 1986, at 3; *see also JAGC Regimental Activation*, The Army Lawyer, May 1986, at 16.

"*JAG Corps Joins Regimental System*, Alumni Newsletter, The Judge Advocate General's School, Fall 1986, at 1.

¹³*JAGC Regimental Activation*, *supra* note 11.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

tory of the Corps. Their prestige, stature, and experience link the present generation of judge advocates with the legacy of the Corps. At the activation ceremony, the regimental commander, Major General Hugh Overholt, named Major General Kenneth J. Hodson (ret.) as the first Honorary Colonel of the Corps, and Sergeant Major John Nolan (ret.) as the first Honorary Sergeant Major of the Corps.¹⁷

General Hodson served as The Judge Advocate General from 1967 until he retired in 1971. He was recalled to active duty and was the first general officer to serve as Chief Judge of the U.S. Army Court of Military Review. The Hodson Criminal Law Chair at The Judge Advocate General's School is named in his honor.^{**}

Sergeant Major Nolan became the first Senior Staff Noncommissioned Officer in the Office of The Judge Advocate General in May 1980. Earlier he had served with the 1st Cavalry Division in Vietnam and had assignments in Korea, Alaska, Germany, Panama, Fort Jackson, Fort Ord, Fort Leonard Wood, and Fort Benning. He retired in 1983 after completing thirty years of service.¹⁹

The Corps held a competition to choose the design for the regimental crest. Colonel Richard K. McNealy, then Chief of the International Law Division, Office of The Judge Advocate General, and Mr. Byrd Eastham, the illustrator for The Judge Advocate General's School, submitted the winning designs.²⁰ The regimental crest consists of the familiar JAG crest (a crossed quill and sword over a wreath, all in gold) on a dark blue shield bordered in silver. Beneath the shield is a banner with the year 1775 inscribed on it. The quill and the sword symbolize the dual roles of the judge advocate, lawyer and soldier. The year, 1775, marks the founding of The Judge Advocate General's Corps, when the Continental Congress selected William Tudor to be Judge Advocate of the Army.²¹ The dark blue and silver of the shield are the colors traditionally associated with the Corps. The gold of the wreath, quill, and sword stands for excellence.

IV. OPERATION "URGENT FURY" — GRENADA

On the morning of October 25, 1983, United States forces landed on

^{**} *JAG Corps Joins Regimental System*, *supra* note 12.

^{**} More complete biographies of General Hodson are published in 1075 History, *supra* note 1, at 241-42, and *Honorary Colonel and Sergeant Major of the Corps*, Alumni Newsletter, The Judge Advocate General's School, Fall 1986, at 3.

¹⁹ A more complete biography of Sergeant Major Nolan appears in *Honorary Colonel and Sergeant Major of The Corps*, *supra* note 18.

^{**} *Regimental Crest Unveiled*, Alumni Newsletter, The Judge Advocate General's School, Fall 1986, at 1.

^{**} 1975 History, *supra* note 1, at 7.

the Caribbean island of Grenada to assist in restoring a democratic government, to protect United States citizens, and to remove the Cubans and their influence.²² Combat operations did not last long. All major military objectives had been achieved within three days. By November 2 all combat operations had ceased. Most of the combat units had returned to the States by December 12, although some soldiers remained in Grenada as a peacekeeping force.²³

The majority of the combat troops were from the 82d Airborne Division, Fort Bragg, North Carolina.²⁴ The staff judge advocate of the 82d Airborne Division, Lieutenant Colonel Quentin Richardson, learned at 9:00 a.m. on October 24, 1983, that division elements would deploy to Grenada the next day. The division received an alert notification at 8:00 p.m. that evening. Colonel Richardson left for Grenada on October 25 with the division assault command post. From that time on judge advocates from the 82d Airborne Division, XVIII Airborne Corps, John F. Kennedy Special Warfare Center, the U.S. Army Claims Service, and elsewhere provided legal support to the combat troops, the troops that remained at Fort Bragg, and to their families. This section will focus on judge advocate participation in Operation Urgent Fury and the lessons learned from that participation.²⁵

A. LEGAL SUPPORT IN GRENADA

The legal support provided to the commanders and troops in Grenada fell into four main areas — legal assistance, military justice, law of war, and administrative law.

Prior to deploying, the judge advocates had to determine what equipment and supplies they would need in Grenada. Due to a lack of specific information about the political and legal situation, the exact nature of judge advocate responsibilities was not known until after

²²See Borek, *Legal Services During War*, 120 Mil. L. Rev. 19, 43 (1988). For legal analyses of the U.S. intervention in Grenada, see Riggs, *The Grenada Intervention: A Legal Analysis*, 109 Mil. L. Rev. 1 (1985), and Romig, *The Legal Basis for United States Military Action in Grenada*, *The Army Lawyer*, April 1985, at 1.

²³Borek, *supra* note 22, at 43; Memorandum, United States Forces Command, 30 Oct. 1986, subject: JAGC History Update, at encl. 1. Enclosure 1 contains two after action reports. One, dated 10 April 1984, is from the Staff Judge Advocate, 82d Airborne Division; the second (undated) is from the Office of the Staff Judge Advocate, XVIII Airborne Corps [hereinafter After Action Report (82d Abn Div) and After Action Report (XVIII Abn Corps), respectively].

**Nine combat battalions participated: one U.S. Marine Corps battalion, two Army Ranger battalions, and six battalions from the 82d Airborne Division.

**After Action Report (82d Abn Div), *supra* note 23; After Action Report (XVIII Abn Corps), *supra* note 23. A general account of the judge advocate participation in combat operations appears in Borek, *supra* note 22.

arrival in Grenada.²⁶ The legal support element was equipped so that it could accomplish all anticipated missions. The basis combat library was significantly supplemented by course books from the International Law Division of The Judge Advocate General's School, and by historical materials relating to legal issues encountered in previous conflicts from the John F. Kennedy Special Warfare Center.²⁷

Typewriters (mechanical and electrical) and a vehicle were essential equipment. The mechanical typewriters proved to be invaluable, as electrical outages were frequent in Grenada. Having a vehicle for transportation permitted the JAG officers to travel to locations such as the U.S. Embassy, the Governor-General's residence, and the Attorney General's chambers to solve problems face-to-face. A claims investigation team was able to visit remote locations, which led to the discovery of continuing problems in the misappropriation of private property. **

Legal assistance was not a primary concern during planning because of a belief that soldiers in the field would not need legal assistance for several weeks after deployment. By evening of the third day in Grenada, however, long lines of soldiers were waiting to talk with JAG officers on matters such as powers of attorney, debt payments, cashing paychecks, and wills. This immediate need for legal assistance will be a factor in judge advocate planning for future conflicts.²⁹

Unlike legal assistance, military justice was not a concern until the troops were removed from the front lines. No major crimes were committed, but after the first week there was considerable Article 15 activity. After their troops were withdrawn from combat, commanders began acting on disciplinary problems that had occurred during the combat phase of Urgent Fury. Minor offenses, such as sleeping on guard duty, disobedience, and disrespect, as well as major events, such as receipt of friendly fire, accidental shootings, and allegations of more serious misconduct that had occurred during the combat phase, required investigation.³⁰ By October 27, brigade trial counsel had arrived in Grenada to support their commanders; a defense counsel followed three days later.

Law of war questions were the most difficult to anticipate and handle. One of the first problems to occur dealt with the prisoner of war camp. By the end of the first day of combat, U.S. Army forces had

** After Action Report (XVIII Abn Corps), *supra* note 23, at 1.

²⁷*Id.* at 2.

²⁸*Id.*

** After Action Report (82d Abn Div), *supra* note 23, at 6

³⁰*Id.*

captured 450 Cubans and 500 Grenadians. The Cuban personnel and hostile Grenadians were assembled in a dilapidated building complex that had served as housing for the Cuban labor force. Neither sanitation facilities nor electricity were available. Food was scarce. The Caribbean Security Forces, under the command of a Marine general, controlled the camp, but security was minimal. Captured Cuban military and Grenadian People's Revolutionary Army personnel were treated as enemy prisoners of war. Medical personnel were classified as "retained personnel" and cared for the Cuban sick and wounded. Some questions arose as to the status of the Cuban airfield workers and dependents who had not put up any armed resistance. The Department of the Army declared them to be civilians accompanying the armed forces, which entitled them to prisoner of war status.³¹

The treatment of the dead and wounded raised additional law of war problems. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field requires at all times, but particularly after an engagement, that a search must be made for the dead, and that measures must be taken to prevent their bodies from being despoiled. The wounded must receive adequate medical care.

During Operation Urgent Fury, the bodies of the dead were not promptly buried, and some reportedly were despoiled by farm animals. Members of the Delegation of the International Committee of the Red Cross (ICRC) were also concerned about the inability of the U.S. forces to distinguish between Cuban and Grenadian dead. Initially, the ICRC refused to ship unidentified bodies to Cuba. The delegation relented once it became obvious that identification could not be completed. Cuba later returned fourteen bodies of non-Cubans to Grenada for disposition.³²

There were also allegations that U.S. Forces violated the law of land warfare. The most serious was the bombing of a mental hospital, which resulted in the deaths of a number of patients.³³ This event was brought to light because of a news report, and quick, accurate advice from the judge advocates in Grenada kept the issue from mushrooming.

A thorough investigation, with JAG advice and support, proved that the hospital was a valid military target. The hospital's roof was not marked with red crosses, like other hospitals in Grenada. Instead,

³¹*Id.* at 5.

³²After Action Report (XVIII Abn Corps), *supra* note 23. Annex (Treatment of the Dead and Wounded).

³³*Id.* Annex (Investigation of War Crimes).

the walls of the hospital displayed the symbol of the People's Revolutionary Army, large red dots on a white background. A common wall surrounded both the hospital and Fort Frederick, headquarters of the People's Revolutionary Army. Two anti-aircraft positions stood near the nurses' quarters, only fifty meters from the mental hospital. U.S. forces had come under hostile fire from Fort Frederick, the anti-aircraft positions, and the mental hospital. Because of the quick investigation, U.S. commanders were able to present photographs and witness testimony that showed no law of war violation had occurred.³⁴

An important international law issue, the status of U.S. forces abroad, is primarily the responsibility of the Department of State. A status of forces agreement (SOFA) normally safeguards the interests of the United States and its military personnel by providing a degree of immunity from the criminal jurisdiction of the host country, exemption from duties and taxes, and avoidance of immigration and customs requirements.³⁵ In Grenada, however, no SOFA existed, and judge advocates played a crucial role in clarifying the status of U.S. forces.

The need for a SOFA became apparent shortly after deployment. On November 5, 1983, the U.S. Department of State sent to the U.S. embassy a draft of proposed diplomatic notes to be exchanged between the U.S. ambassador and the Governor-General of Grenada. The exchange did not take place, however, until March 12, 1984. In the interim, JAG attorneys filled the gap. They negotiated an understanding with the Attorney General of Grenada that gave the United States exclusive jurisdiction over its forces, prepared official proclamations for the Grenadian Government, and drafted a proposed "Visiting Forces Ordinance."³⁶ Judge advocates were also active in resolving civil and criminal matters involving individual soldiers.³⁷ Finally, a judge advocate reviewed the draft exchange of diplomatic notes and pointed out several necessary revisions.

One of the most difficult administrative law problems was the use of property, both government and private, by U.S. forces. During Operation Urgent Fury, U.S. military personnel seized dozens of privately-owned vehicles. The homes of private citizens were used as troop billets. U.S. soldiers rarely provided receipts, and the U.S. forces maintained no central register of requisitions.³⁸ The extent of

³⁴*Id.*

³⁵*Id.* Annex (Status of Forces Agreement).

³⁶*Id.*

³⁷*Id.*

³⁸*Id.* Annex (Requisitions of Private Property—Real and Personal).

property use was not realized until after a storefront claims office had opened in St. George.

The U.S. Army Claims Service arranged with the Department of Defense for the Army to assume single-service claims responsibility for Grenada. The Claims Service quickly coordinated with the Staff Judge Advocate of the XVIII Airborne Corps to appoint foreign claims commissions to settle noncombat claims generated by U.S. military forces. On November 7 the St. George claims office opened, staffed by attorneys from the XVIII Airborne Corps. The Claims Service also sent experienced claims personnel from Fort Meade to provide technical advice and assistance to the foreign claims commissions and to coordinate on related issues, such as arranging for Corps of Engineers' assistance with real estate claims. The initial claims program settled over 700 claims and paid claimants more than \$500,000.³⁹

The initial claims program excluded claims resulting from combat activities. In appreciation of the overwhelming support of the Grenadian people, however, the U.S. Department of State proposed a program that would compensate innocent Grenadians for combat-related property damage, injuries, and deaths. After obtaining approval and funding for the project, the State Department asked for assistance from the Claims Service in implementing the program and drafting the governing directives. During the summer of 1984, Fort Meade claims personnel again went to Grenada to settle claims under the "Combat Claims Program." This program settled an additional 900 claims for \$1.9 million. The Combat Claims Program was unprecedented and provided further valuable experience in contingency claims operations.

As was expected, the issue of war trophies and captured enemy property arose during Operation Urgent Fury. Efforts to prevent returning soldiers from smuggling contraband into the United States were not entirely successful. Army regulations dealing with the control and registration of war trophies were not taken to Grenada. To fill this gap, the Staff Judge Advocate prepared a command directive based on general international law principles, the Uniform Code of Military Justice, and custom enforcement procedures.⁴⁰

After hostilities ceased, negative propaganda directed toward former government officials became prominent. Several of these officials

³⁹Memorandum, JACS-Z, 29 Sept. 1986, subject: JAGC History Update. For a complete description of the judge advocate claims operation in Grenada see Harris, *Grenada—A Claims Perspective*. The Army Lawyer, Jan. 1986, at 7.

⁴⁰"After Action Report (XVIII Abn Corps), *supra* note 23, Annex (War Trophies).

and their attorneys complained that negative publicity would make it impossible to receive a fair trial. The news media again echoed the charges. As a result, the political advisor to the U.S. Forces, Grenada, requested the Staff Judge Advocate to perform a legal review of all psychological operations.⁴¹

B. LEGAL SUPPORT AT FORT BRAGG

Even though the 82d Airborne Division had an active, ongoing Preparation for Overseas Replacement (POR) program, many members of the deploying forces decided at the last minute to execute wills and powers of attorney. To provide the maximum amount of service to the deploying soldiers, attorneys and legal specialists went to the unit areas to assist in preparing wills and powers of attorney. An attorney was also located at the lock-in facility adjacent to Pope Air Force Base to provide the opportunity to execute documents until the time soldiers boarded the aircraft for Grenada. From the first alert, and for the next seventy-two hours, the legal assistance office remained open and handled a large amount of business from those anticipating deployment of their units. Soon after the first alert the number of deploying units requiring legal support exceeded the available judge advocate manpower. The preparation of wills, except in holographic form, had to be stopped. Unit adjutants were pressed into service to notarize documents. Rear detachment commanders arranged to deliver executed documents to the grantee.⁴²

The judge advocates who remained at the home station also provided legal assistance to the family members of the deployed soldiers. To ensure that family members were aware of the availability of legal assistance, judge advocates participated in family assistance briefings. At these briefings, representatives from service-related agencies gave brief presentations describing their functions. An attorney from the Fort Bragg Legal Assistance Office spoke at each briefing and remained afterward to answer questions. The briefings made the family members aware that legal advice was available and how they could obtain needed assistance. In addition, a Family Assistance Center (FAC) provided information and assistance to the families of deployed soldiers. Within twenty-four hours of the alert notification, the FAC was staffed and operational. The FAC was centrally located and had four phone lines. Either an attorney or a legal specialist was present

⁴¹*Id.* Annex (Psychological Operations).

⁴²After Action Report (82d Abn Div), *supra* note 23, at 1,2.

at all times. Legal specialists did not give legal advice, but instead screened calls and forwarded legal problems to the on-call attorney.⁴³

The majority of legal assistance clients needed powers of attorney. Legal assistance officers at Fort Bragg helped family members obtain powers of attorney with the aid of attorneys deployed with the forces in Grenada. The legal assistance officers also worked with the local banks to ensure that family members would not encounter problems using a general power of attorney to cash a government paycheck. The prior consultations between bank managers and legal assistance officers minimized problems.⁴⁴

Military justice matters were initially of little concern to the commanders of the deploying units. Within a few days after the beginning of the operation, however, disciplinary problems arose among the soldiers who remained at Fort Bragg.⁴⁵ Courts-martial were halted due to the deployment of convening authorities, commanders, witnesses, and court members. Discharge boards were cancelled indefinitely for the same reason. Some short Article 32 investigations were completed, and post-trial processing continued with little disturbance. As troop units returned from Grenada, military justice again became a primary concern. The division military justice caseload reached a two-year high as old cases postponed due to Urgent Fury shared the docket with new cases generated during the operation.⁴⁶

The 82d Airborne Division implemented its Privately Owned Vehicle (POV) storage plan during the deployment. Over a thousand vehicles were stored in an open field adjacent to the Division area. Security of vehicles was a problem; several incidents of vandalism occurred. The Office of the Staff Judge Advocate worked in conjunction with the Division Adjutant General to establish a system to record damage and assist soldiers in filing claims. As returning soldiers picked up their vehicles, they received a form, drafted by a judge advocate, on which to identify and record any damage. The soldiers signed the form, which was witnessed by an inspector at the storage site. The form, along with an inventory the soldier had completed when he stored the vehicle, were sent to the XVIII Airborne Corps claims office. The claims office kept the forms on file, pending receipt of a claim from the soldier. This system provided for efficient and

⁴³*Id.* at 2.

⁴⁴*Id.* at 2, 3.

⁴⁵*Id.* at 3.

⁴⁶*Id.* at 3, 4. Cases arose during Operation Urgent Fury that dealt with crimes seldom seen in peacetime, such as war crimes and cases involving war trophy contraband.

rapid return of the vehicles and also protected the interests of both the government and the soldier.⁴⁷

C. SUMMARY

Operation Urgent Fury demonstrated the wide range of legal support that judge advocates are ready to provide in combat operations, both to the deploying units and to the units remaining at the home station. Initially, legal assistance is the most important function judge advocates perform during and immediately after deployment. The extensive POR in the 82d Airborne Division was crucial, because it was not possible to provide every soldier with all the legal documents he needed only after the unit received an alert.

Judge advocates who accompanied the deploying units were quickly immersed in issues ranging from application of the Geneva Conventions to the ability of local civilians to sue U.S. soldiers in the local courts. The intense media interest in U.S. military actions heightened the need to provide commanders with timely and accurate legal advice. Commanders not only had to make and execute the "right" decisions, but also needed to rapidly explain why they were correct. Proper legal advice was crucial to both goals.

At the home station, legal assistance to family members remained a primary function after deployment. The lull in military justice activity immediately after deployment allowed defense counsel and military justice attorneys to ease the strain on the legal assistance office during the first days of the operation, when the demand for wills and powers of attorneys peaked. Consultations with local banks, landlords, and businesses eased problems for family members facing monetary difficulties because of the soldiers' absence. Finally, an efficient screening mechanism ensured that family members with legal problems received an attorney's help, while nonlegal problems were referred to other agencies that could provide assistance.

Operation Urgent Fury showed how important it is that judge advocates become involved in the earliest possible stage of a military operation. Judge advocates will continue to play an important combat role in the future.

V. GANDER, NEWFOUNDLAND AIRCRASH

On December 12, 1985, soldiers from the 101st Airborne Division who had just completed a six month Sinai peacekeeping tour with the Multinational Force and Observers were aboard a chartered Arrow

⁴⁷*Id.* at 4.

Airlines aircraft on their trip home to Fort Campbell, Kentucky. They had stopped to refuel in Gander, Newfoundland, and were attempting to take off again when the plane crashed, killing all 248 soldiers on board.⁴⁸

The Army immediately organized to provide maximum assistance to the next-of-kin. A Steering Committee was appointed at OTJAG under the direction of Brigadier General Hansen to handle the legal issues arising from the crash. The Committee included representatives from Administrative Law, Claims Service, Contract Law, International Law, Legal Assistance, Litigation Division, TJAGSA, and the Army General Counsel's Office. Major General Overholt approved an exception to policy and allowed the appointment of a legal assistance officer to aid each of the primary next-of-kin.⁴⁹

The majority of assistance was offered in the Fort Campbell area where approximately one-fourth of the survivors lived.⁵⁰ Reserve component judge advocates were also utilized to provide assistance to the families. Next-of-kin were located throughout the United States, Europe, the Far East, and Central America. A total of sixty-four active duty and twenty-five reserve legal assistance officers were utilized to render aid to the families of the victims.⁵¹

To train the officers selected to provide legal assistance to the survivors, The Judge Advocate General's School conducted a special Survivor Assistance Legal Advisor Course. The course was held on February 18-19, 1986. In addition to providing information about the crash, the School provided instruction on evaluating and valuing claims, survivor benefits, tax matters, small estate administration, and probate.⁵²

The survivor support effort was quickly organized at Fort Campbell. The Adjutant General was the overall coordinator, with chaplain and medical (mental health) assistance being the initial areas of emphasis. A "one-stop" processing center, the Family Assistance Center, consisting of the casualty operation and various staff and community support organizations, began operating on the 13th of De-

⁴⁸Memorandum, DAJA-LA, 15 Sept. 1986, subject: JAGC History Update [hereinafter Sept. 1986 Update]; Memorandum, JAGS-ADA, 14 Oct. 1986, subject: JAGC History Update [hereinafter Oct. 1986 Update]; Memorandum, United States Forces Command, 30 Oct. 1986, subject: JAGC History Update, at encl. 2. Enclosure 2 contains the After Action Report from the Staff Judge Advocate, 101st Airborne Division [hereinafter After Action Report (101st Abn Div)]. See also *The Army Lawyer*, Feb. 1986, at 52; May 1986, at 59; Sept. 1986, at 46; Dec. 1986, at 58.

⁴⁹Oct. 1986 Update, *supra* note 48.

⁵⁰After Action Report (101st Abn Div), *supra* note 48, at 4.

⁵¹Sept. 1986 Update, *supra* note 48.

⁵²Oct. 1986 Update, *supra* note 48.

ember. Initially, judge advocates were not part of the center; but it quickly became clear that judge advocates were necessary to provide legal advice to the Casualty Assistance Officers very early in the process. A table for judge advocates was set up in the Family Assistance Center.

The Deputy Staff Judge Advocate (DSJA) coordinated the judge advocate support effort with the other Division support elements. The Staff Judge Advocate (SJA) attended daily staff meetings, advised on legal matters related to the crash outside the survivor assistance arena, and supervised the normal SJA functions. Constant coordination between the SJA and the DSJA kept the support efforts focused and coordinated.⁵³

The judge advocate support focused on Claims and Legal Assistance. Claims were separated into claims against the government for damages resulting from the crash itself and affirmative claims against the carrier, Arrow Airlines. Legal assistance support covered a variety of areas. Assistance was provided to aid in gaining access to funds in financial institutions, to help probate wills, and to obtain civilian counsel when necessary.

Within a short time after the Gander tragedy, civilian attorneys or their representatives were attempting to solicit relatives of the crash victims in order to initiate lawsuits against Arrow Airlines. Casualty Assistance officers were advised of this fact and were requested to report any such activity to the SJA. Several reports were received. Adequate information was not always submitted, which delayed reporting the actions to the local bar associations. Since Fort Campbell is located in both Kentucky and Tennessee, two local and state bar associations were involved. An Aviation Accident Lawyer Referral List was prepared to assist the families. Contingent fee agreements were obtained in the twelve and one-half to fifteen per cent range.⁵⁴

Although not a primary focus of JAG support, Administrative Law questions arose that had to be answered. These questions involved media control problems, release of information and Privacy Act implications, handling of memorial funds/donations (private contributions to a survivors' assistance fund), advice to Summary Court Officers, and dealing with carrier representatives and their offers of assistance. The contact established with OTJAG proved helpful in dealing with these problems.⁵⁵

⁵³After Action Report (101st Abn Div), *supra* note 48, at 1.

⁵⁴*Id.* at 14 (Annex G).

⁵⁵*Id.* at 2.

The crash in Gander, Newfoundland, was a tragedy, and nothing can erase the unfortunate loss of life that occurred. The JAG Corps and everyone in the Army did all that was possible to assist the families in dealing with their losses. In recognition of the legal assistance effort to aid the families of the soldiers who died in the Gander, Newfoundland, crash, the American Bar Association's Standing Committee on Legal Assistance to Military Personnel (LAMP) presented an award to the Army. On October 9, 1986, during the 1986 Worldwide JAG Conference and Annual Continuing Legal Education Program at The Judge Advocate General's School, Mr. Clayton Burton, Chairman of the LAMP Committee, presented the award to General John A. Wickham, Jr., Chief of Staff of the Army. **

During his comments Mr. Burton noted that LAMP previously had recognized outstanding achievement in this field only fifteen times in its forty-five year history. Mr. Burton also stated:

The truly unfortunate tragedy at Gander, Newfoundland, last December put the Army and its lawyers to the ultimate test. The families of the 248 soldiers who were killed were scattered throughout the United States, Europe, the Far East and Central America. Clearly, the Army was tasked with one of the most exhausting and logistically complex legal assistance scenarios it had ever faced. The entire Army, from the staff in Washington, to the Casualty Assistance officers and active duty and reserve judge advocates, worked together as the Gander Legal Assistance Support Team. The needs of these deserving families were met in exemplary fashion.⁵⁷

VI. PERSONNEL MATTERS

A. PROFESSIONAL RECRUITING OFFICE

In July 1980, The Judge Advocate General established the Professional Recruiting Office, located initially at the U.S. Army Legal Services Agency in Falls Church, Virginia. In response to a shortage of officers that placed the Corps below its authorized end strength, Major General Alton Harvey established an office dedicated to recruiting highly qualified law school graduates into the Corps and to increasing the number of female and minority applicants. The Recruiting Office was staffed with three JAGC officers and one civilian and

⁵⁶*TJAGSA Practice Notes – Legal Assistance Items: ABA Legal Assistance Award.* The Army Lawyer, Nov. 1986, at 69.

⁵⁷*Id.*

placed under the Chief, Personnel, Plans, and Training Office for policy guidance and supervision.

Relocated to its own facility at Fort Belvoir, Virginia, in January 1984, the Recruiting Office trains and supports forty-five active duty JAGC attorneys who serve as Field Screening Officers. As part-time recruiters, the Field Screening Officers visit 154 ABA-accredited law schools twice yearly to interview interested law students. The Recruiting Office also develops recruiting literature and advertising programs, manages an annual Summer Intern Program for first and second year law students, maintains a toll-free telephone line for prospective applicants, and, as of 1983, handles the commissioning process for those selected for JAGC appointments.

B. JAGC RECRUITING: THE SEXUAL PREFERENCE ISSUE

In the last six years, The Judge Advocate General's Corps has faced the issue of discrimination based on sexual preference in the legal hiring process. An increasing number of law schools have barred Army JAGC recruiters from conducting on-campus interviews of law students. These law schools have adopted policies banning employers who discriminate on the basis of sexual preference from recruiting on their campuses, and now require employers to sign anti-discrimination policy statements before using school placement facilities. Due to existing Department of Defense and Army policy excluding homosexuals from military service,⁵⁸ Army recruiters may not sign policy statements that prohibit discrimination in hiring based on the sexual preference of the applicant.

The number of law schools enforcing an anti-discrimination policy that includes sexual preference has increased from eleven in 1982 to twenty-one in 1988;⁵⁹ Army recruiters visit the remainder of the 175 ABA-accredited law schools. Law students attending schools prohibiting on-campus interviewing by Army recruiters continue to receive information about the JAG Corps through direct mailings and advertisements in legal publications.

C. FUNDED LEGAL EDUCATION PROGRAM

Each fiscal year The Judge Advocate General may select twenty-five Army officers to attend civilian law schools at the government's

⁵⁸See Army Reg. 635-200, Personnel Separations: Enlisted Personnel (5 July 1984).

⁵⁹Memorandum, DAJA-PT, undated, subject: Judge Advocate General's Corps History Update [hereinafter PPT Memorandum].

expense.⁶⁰ The officers selected must have between two and six years of military service. Selections are competitive. The officers selected incur a service obligation after they complete law school.⁶¹ Currently, thirty-four officers are participating in the Funded Legal Education Program. Of these, three are minorities and seven are women.⁶²

D. STRENGTH OF THE CORPS

At the end of fiscal year 1987, the Corps consisted of 1,760 commissioned officers, seventy warrant officers, and 2,162 enlisted members. The majority of the enlisted members, 2,058, were legal specialists.⁶³ The remaining 104 enlisted soldiers were court reporters.⁶⁴ Among officers, the representation of women and ethnic minorities was as follows:

Blacks	104
Hispanics	31
Asian and Native Americans	17
Women	203 ⁶⁵

Fiscal year 1987 also saw a dramatic increase in the number of civilian attorneys supporting the JAG Corps. At the end of fiscal year 1987, there were 276 civilian attorney positions. Of the filled positions, forty-seven are filled by women and twenty by minorities.⁶⁶

In 1986, as a result of the Department of Defense Reorganization Act,⁶⁷ the JAG Corps decided to substantially increase the legal support provided to the Office of the General Counsel and to the Department of Justice.⁶⁸ Additionally, the Procurement Fraud Division, consisting of ten attorneys and eight support personnel,⁶⁹ and the Environmental Litigation Branch, Litigation Division, were formed to enhance legal support for acquisition and environmental matters.⁷⁰

⁶⁰Army Reg. 351-22, Schools: The Judge Advocate General's Funded Legal Education Program (15 Oct. 1981).

⁶¹*Id.* at para. 15.

⁶²PPT Memorandum, *supra* note 59.

⁶³Military Occupational Specialty (MOS) 71D.

⁶⁴PPT Memorandum; *supra* note 59; Telephone interview with Major Thomas Romig, Plans Officer, Office of The Judge Advocate General, Headquarters, Department of the Army (Apr. 19, 1988).

⁶⁵PPT Memorandum, *supra* note 59.

⁶⁶*Id.*

⁶⁷Department of Defense Reorganization Act, Pub. L. No. 99-433, 100 Stat. 992 (1986).

⁶⁸PPT Memorandum, *supra* note 59.

⁶⁹*Id.*

⁷⁰*Id.*

E. ACQUISITION LAW SPECIALTY PROGRAM

In 1979, the Judge Advocate General's Corps began the Contract Law Specialty Program in conjunction with the Army Materiel Command (AMC). The program trains selected judge advocates in systems acquisition law.⁷¹ Officers selected for the program serve a thirty-six month tour in an AMC legal office. During the first twenty-four months, they receive training in all areas of contract law and attend the basic and advanced contract law course at The Judge Advocate General's School and the Army Logistics Management Center at Fort Lee, Virginia.⁷² In the final twelve months, participants continue on-the-job training in one of the branches of the AMC legal office: procurement law branch, adversary proceedings branch, or patent law branch.⁷³ JAGC officers who accept assignment into the program incur a one-year service obligation.⁷⁴

In 1984 The Judge Advocate General entered into a Memorandum of Understanding with the Army General Counsel and the Chief Counsel of the Army Materiel Command.⁷⁵ The memorandum was intended to provide additional opportunities for judge advocates to participate, train, and develop in procurement law at the acquisition activity level in AMC.⁷⁶ The Materiel Command made a commitment to expand the number of legal positions staffed with judge advocates. In return, The Judge Advocate General agreed to continue participating in the Contract Law Specialty Program, to assign qualified attorneys at the major through colonel level to the new positions as they became available, and to establish and maintain a procurement law career program for selected judge advocate officers.⁷⁷

On September 9, 1986, Major General Overholt signed the Acquisition Law Specialty implementation paper, which began the Acquisition Law Specialty Program.⁷⁸ The program established a centrally managed system for identifying, selecting, and training selected

⁷¹The Judge Advocate General's Corps Acquisition Law Specialty Program, at 4 (approved Sept. 9, 1986) [hereinafter Implementation Paper].

⁷²Judge Advocate General's Corps Personnel Policies, para. 7-14, at 28 (Oct. 1987) [hereinafter JAGC Personnel Policies].

⁷³Implementation Paper, *supra* note 71, at 4.

⁷⁴JAGC Personnel Policies, *supra* note 72, para. 7-14..

⁷⁵Memorandum of Understanding Among the General Counsel, Department of the Army; The Judge Advocate General; and the Command Counsel, U.S. Army Material Development and Readiness Command (31 July 1984), *reprinted in* Implementation Paper, *supra* note 71, app. A.

⁷⁶*Id.* para. 2.

⁷⁷*Id.* para. 3.

⁷⁸Implementation Paper, *supra* note 71.

JAGC military and civilian attorneys to develop and to maintain an expertise in acquisition law. It provides an opportunity for progressive and consecutive assignments in acquisition law, contract law, and other related areas. The Assistant Judge Advocate General for Civil Law oversees the program.⁷⁹ Ninety-two officers had qualified as acquisition law specialists by the end of 1987.⁸⁰ The field continues to grow and provide quality legal service to the Army.

On May 31, 1988, the Army General Counsel, The Judge Advocate General, and the Command Counsel of The Army Materiel Command revised the 1984 Memorandum of Understanding. This agreement increased the number of military attorneys in AMC procurement law positions and designated certain senior procurement law positions within AMC to be filled with military attorneys in grades of major, lieutenant colonel, and colonel.

VII. MILITARY JUSTICE DEVELOPMENTS

A. *THE MILITARY JUSTICE ACT OF 1983*

The Military Justice Act of 1983⁸¹ made numerous important changes in the Uniform Code of Military Justice, particularly in the convening authority's responsibilities and the appellate process. It streamlined military justice procedures without detracting from any substantive rights that service members enjoy.⁸² The 1983 Act went into effect on August 1, 1984, the effective date of the 1984 *Manual for Courts-Martial*.

The 1983 Act amended UCMJ articles 25, 26, 27, and 29 to eliminate the requirement that the convening authority personally take all actions affecting the composition of courts-martial. Article 25 now permits the convening authority to delegate authority to excuse members before assembly of the court to the staff judge advocate, legal officer, or any other principal assistant. The convening authority still remains fundamentally responsible for the composition of the membership. He or she still must personally select and detail court members, and the convening authority's delegate may not excuse more than one-third of the members that the convening authority has detailed to the court-martial. In addition, the delegate's authority ex-

⁷⁹Judge Advocate General's *Corps Personnel Policies*, para. 7-15, at 28 (Oct. 1987).

⁸⁰PPT Memorandum, *supra* note 59.

⁸¹Pub. L. No. 98-209, 97 Stat. 1393(1983), reprinted in *The Army Lawyer*, Jan. 1984, at 38.

⁸²10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

⁸³See Cooke, *Highlights of the Military Justice Act of 1983*, *The Army Lawyer*, Feb. 1984, at 40.

pires after assembly. Thereafter, the convening authority or the military judge may excuse members for good cause.⁸⁴

Articles 26 and 27 no longer require the convening authority to personally detail the military judge and counsel. The 1983 Act allows the military services to establish detailing procedures by regulation. In the Army, the Trial Judiciary details military judges,⁸⁵ the Trial Defense Service details defense counsel,⁸⁶ and the staff judge advocate details trial counsel.⁸⁷

The 1983 Act also eliminated many of the convening authority's quasi-judicial responsibilities. The convening authority still retains the command prerogatives—he or she decides whether to refer a case to trial, whether to approve, reduce, or suspend the sentence, and whether to disapprove findings of guilty. The convening authority no longer must examine the case for legal sufficiency before and after a court-martial. Legal determinations are now the responsibility of the convening authority's legal adviser—the staff judge advocate. Before charges are referred to a general court-martial, the staff judge advocate must determine that each charge “alleges an offense . . . and is warranted by the evidence . . . in the report of investigation.”” After a general court-martial or a special court-martial in which a bad-conduct discharge is awarded, the staff judge advocate reviews the record and any allegations of error from the defense. He or she need only provide a recommendation to the convening authority; a detailed legal analysis is not necessary.⁸⁹

The 1983 Act made two dramatic changes in appellate procedure. UCMJ article 62 was amended to provide the government a right to appeal certain evidentiary rulings. Where a ruling by the military judge “terminates the proceedings with respect to a charge or specification” or “excludes evidence that is substantial proof of a fact material in the proceeding,” the government may appeal the ruling to a court of military review.⁹⁰ A ruling tantamount to a finding of not

⁸⁴UCMJ art. 29, 10 U.S.C. § 829 (Supp. IV 1986).

⁸⁵Army Reg. 27-10, Legal Services: Military Justice, paras. 5-3, 8-6 (18 Mar. 1988) [hereinafter AR 27-10].

⁸⁶*Id.* para. 6-9.

⁸⁷*Id.* para. 5-3.

⁸⁸UCMJ art. 34, 10 U.S.C. § 834 (Supp. IV 1986).

⁸⁹This summary contains only a very general description of the requirements of the 1983 Act. A more detailed description of pre- and post-trial procedures is in Cooke, *supra* note 83, at 42-43.

⁹⁰See UCMJ art. 62(a), 10 U.S.C. § 862(a) (Supp. IV 1986). Procedures for article 62(a) appeals are in AR 27-10, para. 13-3.

guilty is not appealable,⁹¹ nor are rulings other than those that terminate the proceedings or exclude evidence.⁹²

The 1983 Act also authorized, for the first time, direct review of court-martial decisions by an article III court. Section 10 of the Act gave the Supreme Court jurisdiction to review, on writ of certiorari, decisions of the Court of Military Appeals.⁹³ Through the end of 1987, the Court had twice exercised this jurisdiction. In *Goodson v. United States*⁹⁴ the Court summarily vacated a Court of Military Appeals decision that had held constitutional a military police interrogation despite a claim that the military police investigator had violated Goodson's sixth amendment rights.⁹⁵ The Court's second decision, *Solorio v. United States*,⁹⁶ greatly expanded the jurisdiction of courts-martial.

B. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

Nineteen eighty-four brought the first complete revision of the *Manual for Courts-Martial* since 1969.⁹⁷ The *Manual for Courts-Martial, United States, 1984*⁹⁸ implemented the Military Justice Act of 1983, and made sweeping changes in courts-martial practice. The basic structure of military law remained the same, but the 1984 *Manual* introduced numerous new procedures and created law in many other areas.

The idea of a new *Manual* originated during the drafting of the Military Rules of Evidence.⁹⁹ The drafters of the Military Rules of Evidence began work with a *Manual for Courts-Martial* that traced back to 1895, when the Secretary of War promulgated the forerunner

⁹¹UCMJ art. 62(a).

⁹²Through the end of fiscal year 1987, the government had filed twelve article 62(a) appeals with the U.S. Army Court of Military Review. Interview with Clerk of Court. U.S. Army Court of Military Review (June 1, 1988).

⁹³See 28 U.S.C. § 1259 (Supp. IV 1986).

⁹⁴471 U.S. 1063 (1985).

⁹⁵*United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984). The issue was whether Goodson's request for an attorney, made before any interrogation took place, triggered the prophylactic rule in *Edwards v. Arizona*, 451 U.S. 477 (1981). *Edwards* held that an accused who requests an attorney is not subject to further police interrogation until counsel has been made available to him, unless he initiates further communication with the authorities. 451 U.S. at 484-85.

⁹⁶107 S. Ct. 2924 (1987).

⁹⁷*Manual for Courts-Martial, United States, 1969* (Rev. ed.) [hereinafter MCM. 1969].

⁹⁸Hereinafter MCM, 1984.

⁹⁹See Park, *supra* note 2, at 38-39, for a discussion of the Military Rules of Evidence.

to the 1969 *Manual*.¹⁰⁰ Subsequent manuals had retained the basic format and structure of the 1895 *Manual*, although periodic revisions expanded and modified the contents.’’

In 1975 Congress codified federal evidentiary practice when it approved the Federal Rules of Evidence.¹⁰² This provided the impetus for a similar restructuring of military practice. In 1978 the Evidence Working Group of the Joint Service Committee on Military Justice received a charter to rewrite the military rules, using the Federal Rules of Evidence as a model. In 1980, after a two-year effort, the President promulgated the Military Rules of Evidence as an amendment to the 1969 *Manual*.¹⁰³

The drafters of the Military Rules of Evidence had noted several other parts of the 1969 *Manual* that needed revision. At first, they considered further amending the 1969 *Manual*. The Military Rules of Evidence, however, had demonstrated the benefits of a more comprehensive restructuring of military procedure. In 1980 the General Counsel of the Department of Defense directed a complete revision of the 1969 *Manual*. He set four goals for the new *Manual*.¹⁰⁴ First, military criminal procedure should conform to the federal practice, except where the Uniform Code of Military Justice or military requirements dictate otherwise. Second, each aspect of court-martial practice would be brought up-to-date. Third, the *Manual* would have a new format to make it more useful both to lawyers and commanders. Rules would replace the paragraph format of earlier manuals, and the prescriptive rules would appear separately from nonbinding explanation and discussion. Finally, the *Manual* procedures had to work across the spectrum of military practice, including combat situations.

Over the next three years, a working group of the Joint-Service Committee on Military Justice drafted the *Manual* in fourteen incre-

¹⁰⁰See *Manual for Courts-Martial, United States Army, 1895*.

¹⁰¹Evidentiary rules and explanations of the punitive articles first appeared in 1917. See *Manual for Courts-Martial, United States Army, 1917*. The President first promulgated the *Manual* in 1921. See *Manual for Courts-Martial, United States Army, 1921*, at XXVI. Until 1951 each military department operated a separate criminal justice system. After Congress passed the Uniform Code of Military Justice in 1950, the President promulgated a common manual for all the armed services. *Manual for Courts-Martial, United States, 1951*.

¹⁰²See Pub. L. 93-595, 88 Stat. 926 (1975).

¹⁰³Exec. Order No. 12,198, 3 C.F.R. 151 (1981). A summarized history of the Military Rules of Evidence appears in MCM, 1984, app. 22, at A22-1.

¹⁰⁴MCM, 1984, app. 21, at A21-1 through A21-3, describes the history of MCM, 1984, in greater detail.

ments. The Code Committee¹⁰⁵ reviewed and approved each increment. Following the Code Committee's approval of the entire draft, the *Manual* appeared in the *Federal Register* for public comment in 1983.¹⁰⁶ The working group made numerous modifications to the draft, based on the public comments and also to incorporate the requirements of the Military Justice Act of 1983.¹⁰⁷ The Joint-Service Committee approved the final draft in January 1984, and the President promulgated the *Manual* on April 13, 1984.¹⁰⁸

The 1984 *Manual* comprises five parts: Preamble, Rules for Courts-Martial, Military Rules of Evidence, Punitive Articles, and Nonjudicial Punishment. The Preamble contains a short statement of the sources and exercise of military jurisdiction, the purpose of military law, and the structure of the 1984 *Manual*. The Rules for Courts-Martial and the Military Rules of Evidence set forth the procedural and evidentiary standards that govern courts-martial practice. Part IV, Punitive Articles, lists the elements, maximum punishments, and sample specifications for offenses that violate the punitive articles of the Uniform Code of Military Justice. Finally, Part V sets out procedures for imposing nonjudicial punishment under Article 15 of the Uniform Code.¹⁰⁹

The 1984 *Manual* provides a relatively clear, understandable guide to military criminal law practice. It has operated exceptionally well during its first four years, and it should continue to be the keystone to the Uniform Code in the future.

C. SOLORIO V. UNITED STATES

In *O'Callahan v. Parker*,¹¹⁰ the Supreme Court had rejected, on constitutional grounds, the argument that military status alone was suf-

""The Code Committee consists of the judges of the United States Court of Military Appeals; the Judge Advocate Generals; the Chief Counsel of the Coast Guard; the Director, Judge Advocate Division, Headquarters, United States Marine Corps; and two public members appointed by the Secretary of Defense. See UCMJ art. 67(g). The Code Committee has a statutory charter to make an annual comprehensive survey of the operation of the Uniform Code of Military Justice, and to file an annual report with Congress, the Secretary of Defense and the Service Secretaries, and the Secretary of Transportation. *Id.*

¹⁰⁶48 Fed. Reg. 23,688 (May 26, 1983).

¹⁰⁷See 48 Fed. Reg. 54,263 (Dec. 1, 1983) (proposed *Manual* modifications to accommodate the Military Justice Act of 1983 made available for public comment); see also *supra* text accompanying notes 48 to 63 (discussing 1983 Act).

""Exec. Order No. 12,473, 3 C.F.R. 201 (1985).

¹⁰⁹See Criminal Law Division, TJAGSA, *The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues*, The Army Lawyer, July, 1984, at 1, for a detailed discussion of the 1984 Manual.

¹¹⁰395 U.S. 268 (1969).

ficient to support the exercise of court-martial jurisdiction. *O'Callahan* required the government to demonstrate that an offense was "service-connected" before a court-martial could try a soldier for the crime. That a soldier committed the crime was insufficient to give the military jurisdiction; in addition, the courts had to consider whether there existed a distinct military interest in deterring the offense, the impact of the offense on military discipline and effectiveness, and whether the civilian courts could adequately vindicate the military interests.''' As time passed, the *O'Callahan* service connection test became increasingly unwieldy and difficult to apply. Crimes that occurred outside military installations, but had repercussions in the military community, stretched the "service connection" concept to its limits.

Solorio overruled *O'Callahan* and returned the jurisdictional test to the one established in *In re Grimley*.¹¹² Jurisdiction of a court-martial once again depends only on the soldier's status. If the accused is a member of the armed forces, the military may constitutionally try him or her by court-martial.¹¹³

Solorio dramatically enhanced the disciplinary authority of military commanders. It places an increased obligation on military authorities to coordinate criminal investigation and prosecution policies with their civilian counterparts.¹¹⁴ The potential impact of *Solorio* is huge, but its actual effect will be limited by Army policy,¹¹⁵ military resources, and prosecution efforts by civilian authorities.

D. THE MILITARY JUSTICE AMENDMENTS OF 1986

The Military Justice Amendments of 1986¹¹⁶ further expanded court-martial jurisdiction over Reserve Component soldiers. Section 804 of the 1986 Act amended Article 2 of the Uniform Code of Military Justice¹¹⁷ to authorize court-martial or Article 15 proceedings''

¹¹¹*Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975); see *Relford v. Commandant*, 401 U.S. 355 (1971).

¹¹²*In re Grimley*, 137 U.S. 147 (1890).

¹¹³107 S. Ct. at 2933.

''See Policy Memorandum 87-5, Office of The Judge Advocate General, U.S. Army, subject: Liaison with Civilian Officials After *Solorio*, reprinted in *The Army Lawyer*, Sept. 1987, at 3.

¹¹⁵See, e.g., AR 27-10, para. 4-2 (military ordinarily will not prosecute soldiers if a civilian court has exercised jurisdiction).

''Pub. L. No. 99-661, §§ 801-808, 100 Stat. 3816, 3905-10 [hereinafter 1986 Act], reprinted in *The Army Lawyer*, Feb. 1987, at 28.

¹¹⁷10 U.S.C. § 802 (1982).

¹¹⁸UCMJ art. 15.

against Reserve soldiers for offenses committed while on active duty or while on inactive duty training. An active component general court-martial convening authority may order a Reserve soldier to active duty involuntarily for an Article 15 proceeding, an article 32 investigation,¹¹⁹ or a trial by court-martial.

On July 1, 1988, Reserve Component commanders gained the power to exercise UCMJ authority within the Reserves. They may convene summary courts-martial and impose punishment under Article 15 during periods of inactive duty unit training.¹²⁰ Commanders may conduct these procedures and soldiers may serve their punishments during periods of inactive duty unit training.¹²¹ Special and general courts-martial must be convened by an Active Component general court-martial convening authority,¹²² and these procedures can be conducted only if the accused is ordered to active duty.

Between July 1, 1987, and June 30, 1988, all Reserve officers and enlisted soldiers received training in the Uniform Code, in accordance with UCMJ article 137. Reserve Component commanders also received additional training in criminal law and procedure to prepare for their new responsibilities.¹²³

The 1986 Act also addressed mental responsibility in military criminal practice. Section 802 of the 1986 Act made lack of mental responsibility an affirmative defense in a trial by court-martial.¹²⁴ The accused must prove the defense by clear and convincing evidence.¹²⁵ The test for legal insanity also changed. Under the 1986 Act, an accused must be "unable to appreciate the nature and quality or the wrongfulness of the acts" as a result of "a severe mental disease or defect."¹²⁶

Finally, the 1986 Act also established a five-year statute of limitations for most UCMJ offenses,¹²⁷ modified the time limits for defense post-trial submissions,¹²⁸ and authorized the detail of judge advo-

¹¹⁹UCMJ art. 32.

¹²⁰AR 27-10, paras. 21-6, 21-7.

¹²¹*Id.*

¹²²*Id.* para. 21-8.

¹²³A detailed discussion of these jurisdictional provisions is in Williams, *Reserve Component Jurisdiction: New Powers for the Reserve Component Commander and New Responsibilities for the Reserve Component Judge Advocate*, *The Army Lawyer*, July 1987, at 5. See also Clevenger, *Federal Court-Martial Jurisdiction Over Reserve Component Personnel*, 33 *Fed. B. News & J.* 418 (1986).

¹²⁴See UCMJ art. 50a, 10 U.S.C. § 850a (West Supp. 1988).

¹²⁵*Id.* art. 50a(b).

¹²⁶*Id.* art. 50a(a).

¹²⁷1986 Act, *supra* note 116, § 805.

¹²⁸*Id.* § 806.

ates to perform duties with other federal agencies, including representation of the United States in civil and criminal cases.¹²⁹

E. ARMY RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

In August 1983 the American Bar Association approved the Model Rules of Professional Conduct as the recommended code of ethics for lawyers, replacing the Code of Professional Responsibility. On September 28, 1984, Major General Hugh Clausen, then The Judge Advocate General, solicited the participation of the other services in drafting rules of professional conduct for military attorneys based on the new Model Rules. On December 14, 1984, a joint service working group began meeting to study and to draft rules. The working group circulated its first draft of the proposed rules for comment on June 1, 1985. A second draft was circulated in the Army for comments in September 1986. On June 3, 1987, Major General Overholt, The Judge Advocate General, approved the draft rules for Army use¹³⁰ and directed their publication in the Federal Register for public comment. On October 1, 1987, the Army Rules of Professional Conduct became effective.¹³¹ The Rules apply to all Army active duty and Reserve Component judge advocates, Department of Army civilian attorneys under the supervision of The Judge Advocate General, and lawyers who practice in Army proceedings governed by the Uniform Code of Military Justice and the *Manual for Courts-Martial*.¹³²

VIII. THE JUDGE ADVOCATE GENERAL'S SCHOOL

A. MASTER OF LAWS IN MILITARY LAW

On December 4, 1987, the Judge Advocate General's School became the only Federal Government agency authorized to confer the degree of Master of Laws in Military Law.¹³³ The 1988 Defense Authoriza-

¹²⁹*Id.* § 807.

¹³⁰The other services declined to adopt the proposed rules at that time.

¹³¹The Rules are published in Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (Dec. 1987) [hereinafter *Army Rules of Professional Conduct*].

¹³²See *Army Rules of Professional Conduct*, *supra* note 131, preamble, at 2-3. See generally *Criminal Law Note, Army Rules of Professional Conduct*, *The Army Lawyer*, Oct. 1987, at 56.

¹³³See *TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law*, *The Army Lawyer*, Jan. 1988, at 3 [hereinafter *Master of Laws*]; *TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law*, *The Regimental Reporter*, Spring 1988, at 10.

tion Bill¹³⁴ included the statutory authority to award the degree:

Under regulations prescribed by the Secretary of the Army, the Commandant of The Judge Advocate General's School of the Army may, upon the recommendation of the faculty of such school, confer the degree of Master of Laws (LL.M.) in Military Law upon graduates of the school who have fulfilled the requirements of that degree.¹³⁵

The quest for authority to award the LL.M. degree to graduates of the Judge Advocate Officer Graduate Course began in January 1986 with the Department of Education. Federal policy requires that the Secretary of Education recommend to Congress the federal institutions that will receive statutory degree-granting authority. Federal agencies that wish to grant degrees must petition the Secretary of Education for program review and approval.

On November 26, 1986, after extensive coordination between representatives of the School and the Department of Education, Mr. Delbert Spurlock, Jr.,¹³⁶ submitted the Department of the Army's petition to the Department of Education. The petition included documentation that showed the School's compliance with the Department of Education's criteria for evaluating academic programs, and a letter from Dean James P. White¹³⁷ attesting that the School's Graduate Course program had been accredited by the American Bar Association as a specialized program beyond the first degree in law since 1958.

On December 1, 1986, the School commandant, Colonel Paul J. Rice, appeared before the National Advisory Committee on Accreditation and Institutional Eligibility to formally present the School's request. Chief Judge Robinson O. Everett of the United States Court of Military Appeals also appeared as an American Bar Association representative to attest to the ABA's continuing accreditation of the School's graduate program. At the conclusion of the Commandant's presentation, the National Advisory Committee voted unanimously to advise the Secretary of Education that he recommend to Congress that the School receive degree-granting authority.

Secretary of Education William J. Bennett sent his favorable recommendation to Congress on March 27, 1987. Draft legislation was

¹³⁴National Defense Authorization Act, Pub. L. No. 100-180, 101 Stat. 1019 (1988).

¹³⁵*Id.* § 504 (codified at 10 U.S.C. § 4315 (West Supp. 1988)).

¹³⁶Mr. Spurlock was Assistant Secretary of the Army for Manpower and Reserve Affairs.

¹³⁷Mr. White is the Consultant on Legal Education for the American Bar Association.

included in the House version of the 1988 Defense Authorization Act, and with the consent of the Senate, was incorporated in the legislation that President Reagan signed on December 4, 1987.

On May 20, 1988, Major General Hugh Overholt awarded the first Master of Laws degree to Captain Elyce K.D. Santerre, the distinguished graduate of the 36th Judge Advocate Officer Graduate Course.

B. GILBERT A. CUNEO CHAIR OF GOVERNMENT CONTRACT LAW

On January 9, 1984, during the 1984 Contract Law Symposium, The Judge Advocate General's School dedicated the Gilbert A. Cuneo Chair of Government Contract Law. The Cuneo Chair honors Mr. Gilbert A. Cuneo, a pioneer in the field of government contract law.¹³⁸ At the time of his death in April 1978, Mr. Cuneo was "the unanimously recognized dean of the government contract bar."¹³⁹

Mr. Cuneo taught government contract law at The Judge Advocate General's School from 1944 to 1946, when the School was located on the grounds of the University of Michigan Law School. From 1946 to 1958 he served as an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. In 1958, Mr. Cuneo entered private practice in Washington, D.C.¹⁴⁰

Mr. Cuneo wrote and lectured extensively on all aspects of government contract law. He was a premier litigator and shaped much of the present law on government contracts. Mr. Cuneo was an honorary life member of the National Contract Management Association. He served as a member of its National Board of Advisors and received numerous awards and citations from the association.¹⁴¹

Mr. John E. Cavanagh delivered the first annual Gilbert A. Cuneo Lecture immediately after the dedication of the Cuneo Chair. Mr. Cavanagh, a partner in the Los Angeles office of McKenna, Conner & Cuneo, spoke on "The Adversarial Relationship in Government Contracting: Causes and Consequences." The Cuneo lecture has since been a highlight of the annual Contract Law Symposium.

¹³⁸Cavanagh, *The First Gilbert A. Cuneo Lecture — The Adversarial Relationship in Government Contracting: Causes and Consequences*, The Army Lawyer, May 1984, at 1.

¹³⁹*Id.* at 3.

¹⁴⁰*Id.* at 1.

¹⁴¹*Id.*

C. CONSTITUTION BICENTENNIAL

During 1987 the country celebrated the Bicentennial of the United States Constitution. The Army and The Judge Advocate General's School were in the forefront of the military celebration.¹⁴² The School developed a Bicentennial Resource Packet to assist local military communities with their bicentennial celebrations. The Office of the Staff Judge Advocate, Training and Doctrine Command (TRADOC), wrote a training support package for instructors in TRADOC schools to use in classes explaining the constitution to officers and enlisted soldiers. The School placed on permanent display an exact replica of the United States Constitution. The replica, commissioned by the National Commission on the Celebration of the Constitution, was made from photographic plates of the original Constitution in the National Archives. In addition, a special series of Bicentennial Updates appeared in *The Army Lawyer*, tracing the progress of the Constitutional Convention and the debate over ratification.¹⁴³ The *Military Law Review* published a number of articles with constitutional themes.¹⁴⁴

To recognize the School's accomplishments, the National Commission made the School a Designated Defense Bicentennial Community. In addition, on December 3, 1987, the School received an Award for Outstanding Contribution to the Commemoration of the Constitution Bicentennial.¹⁴⁵

D. COURT OF MILITARY APPEALS VISIT

The United States Court of Military Appeals made a historic journey to Charlottesville on November 13, 1987, to hold its first court session outside of Washington, D.C. The Judge Advocate General's School and the University of Virginia School of Law jointly sponsored the visit.¹⁴⁶

At the beginning of the session, Brigadier General Ronald M. Hold-

¹⁴²See *TJAGSA Celebrates the Bicentennial of the Constitution*. The Regimental Reporter, Spring 1988, at 6.

¹⁴³See *The Army Lawyer*, Jan. 1987, at 48; Apr. 1987, at 46; May 1987, at 68; June 1987, at 51; July 1987, at 66; Aug. 1987, at 69; Sept. 1987, at 73; Oct. 1987, at 64; Nov. 1987, at 65.

¹⁴⁴See, e.g., Bond, *A Criminal Justice System Divided Against Itself*, 113 Mil. L. Rev. 17 (1986); Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 Mil. L. Rev. 1 (1987); O'Neil, *Civil Liberty and Military Necessity—Some Preliminary Thoughts on Goldman v. Weinberger*, 113 Mil. L. Rev. 31 (1986).

¹⁴⁵*TJAGSA Celebrates the Bicentennial of the Constitution*, supra note 142.

¹⁴⁶*Court of Military Appeals Holds Historic Session in Charlottesville*, The Regimental Reporter, Spring 1988, at 6 [hereinafter *Historic Session*].

away, the Commander of the U.S. Army Legal Services Agency and Chief Judge of the United States Army Court of Military Review, moved the admission of sixty attorneys to the bar of the Court of Military Appeals. The admittees included new judge advocates attending the Judge Advocate Officer Basic Course, graduate students in the School's LL.M. program, and faculty members from the School and the University of Virginia.

The court heard oral argument in two cases: *United States v. Sherrod*¹⁴⁷ and *United States v. Guaglione*.¹⁴⁸ *Sherrod* considered whether the military judge's relationship with the victims of a crime was close enough to require his recusal, while *Guaglione* dealt with whether the trial court had properly admitted hearsay statements that the witnesses had later recanted. The session was open to the public and provided an opportunity for law students from the university and newly commissioned judge advocates to see how the military justice system works.¹⁴⁹

IX. OFFICE OF THE JUDGE ADVOCATE GENERAL

A. LITIGATION DIVISION

From 1982 to 1987 the Litigation Division underwent substantial expansion to keep up with the increasing emphasis on litigation. The current branches of the Litigation Division are the Civilian Personnel, General Litigation, Military Personnel, and Tort branches.¹⁵⁰ The Litigation Division is composed of approximately twenty-five attorneys who are representing the Army in over 1500 cases. On October 1, 1987, Litigation Division became a part of **U.S.** Army Legal Services Agency, but remained under the operational control of the Assistant Judge Advocate General for Civil Law.¹⁵¹

In response to the increase in litigation brought against the Army under the Federal Tort Claims Act, especially in the medical malpractice arena, the Justice Department and the Army entered into an agreement in February 1984 whereby an Army judge advocate was

¹⁴⁷26 M.J. 30 (C.M.A.1988).

¹⁴⁸24 M.J. 39 (C.M.A.1987) (order granting petition for review).

¹⁴⁹*Historic Session, supra* note 146.

¹⁵⁰Through 1986 Litigation Division also included a Contract Fraud Branch. In December 1986 the Secretary of the Army established the Procurement Fraud Division. *See infra* text accompanying notes 180 to 182. Until 1988 there was also an Environmental Litigation Branch.

¹⁵¹Memorandum from Lieutenant Colonel William Aileo, Acting Chief, Litigation Division (12 Apr. 1988) [hereinafter 1988 Litigation Memorandum].

detailed to the Tort Branch, Civil Division, Department of Justice. The first officer to hold this position was Major William A. Woodruff.”

The need for JAG participation in federal tort litigation continued to increase during the subsequent two years. This led to additional agreements between The Judge Advocate General and various United States Attorneys to assign judge advocates to represent Army interests in pending lawsuits. Pursuant to these agreements, judge advocates now perform duties with United States Attorney offices in El Paso, Texas; Tacoma, Washington; and Alexandria, Virginia. This aggressive representation of Army interests in the federal judicial system has greatly enhanced the Army’s representation in tort litigation in addition to providing an excellent opportunity for Army lawyers to gain actual trial experience in federal court.¹⁵³

Environmental litigation is the fastest growing area of the civil litigation caseload. Environmental law became an extremely visible area of concern when the Department of the Army began an affirmative action against the Shell Oil Company. On October 3, 1983, the Department of Justice, on behalf of the Department of the Army, presented a claim of up to \$1.8 billion to Shell Oil Company for reimbursement of environmental response costs for damages to the natural resources in and around Rocky Mountain Arsenal.

The ensuing months saw the Special Litigation Branch (now the Litigation Branch of the Environmental Law Division) take on a wide variety of environmental cases. The branch now has approximately thirteen cases, all of which involve large dollar amounts and cover the United States from California to Maryland and from Minnesota to Texas.¹⁵⁴

B. ADMINISTRATIVE LAW DIVISION

In what may have been a first among federal agencies, The Judge Advocate General convened a hearing to determine whether a former Army civilian employee had violated statutory postemployment restrictions.” Under the Standards of Conduct for Department of

“Office of The Judge Advocate General, JAGC History Update for the Litigation Division (1986) [hereinafter 1986 Litigation Update].

¹⁵³*Id.*

¹⁵⁴*Id.*

““See 18 U.S.C. § 207. If a former government employee violates the conflict-of-interest provisions of 18 U.S.C. § 207, the statute authorizes the head of a federal agency (or military department) to bar the former employee from any contacts with the agency on any matter for up to five years. 18 U.S.C. § 207(j) (1982). The individual is entitled to notice and a hearing.

the Army Personnel regulation,¹⁵⁶ a member of the U.S. Army Trial Judiciary was appointed as the hearing examiner. Civilian counsel represented the respondent. At the conclusion of the hearing, the Hearing Officer determined that a violation had occurred. The Secretary of the Army reviewed the hearing officer's decision and concluded that it was correct as to its findings of fact and conclusions of law. Under his statutory sanctioning authority, the Secretary of the Army prohibited the former employee from making, on behalf of any other person except the United States, any formal or informal appearance before or, with the intent to influence, any oral or written communications to the Army on any matter of business for a period of six months.¹⁵⁷

C. LEGAL ASSISTANCE BRANCH

In 1980 The Judge Advocate General placed renewed emphasis on the importance of the legal assistance mission. To revitalize and enhance the program Army-wide, he created a new Legal Assistance Branch within the Administrative and Civil Law Division at The Judge Advocate General's School.¹⁵⁸ Initially staffed by two attorneys, the branch was charged with expanding the legal assistance portion of *The Army Lawyer*; providing technical, ethical, and policy advice for attorneys in the field; reviewing the legal assistance regulation;¹⁵⁹ developing resource materials for distribution to the field; increasing legal assistance CLE instruction; and reviewing the Basic Course legal assistance instruction.

In essence, the Branch's charter was to pursue initiatives to improve the materials and services provided by and for legal assistance attorneys around the world. This continues to be its mission. The burgeoning workload created by the need to maintain and expand the program elements and reference materials that have been developed led The Judge Advocate General in 1985 to authorize the assignment of a third officer to the Branch.

¹⁵⁶Army Reg. 600-50, Personnel-General: Standards of Conduct for Department of the Army Personnel, para. 5-4 (28 Jan. 1988).

¹⁵⁷Memorandum, DAJA-AL, 4 Apr. 1988, subject: Judge Advocate General's Corps History Update.

¹⁵⁸Letter from Major General Hugh J. Clausen, The Assistant Judge Advocate General, to the Commandant, The Judge Advocate General's School, Dec. 1, 1980 (copy on file in the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School).

¹⁵⁹Army Reg. 608-50, Personal Affairs: Legal Assistance (22 Feb. 1974) was replaced by Army Reg. 27-3, Legal Services: Legal Assistance (1 March 1984), which was prepared by the Legal Assistance Branch in accordance with one of its primary initial taskings from The Judge Advocate General.

A revamping of the annual tax assistance program has been one of the most observable results of the challenge to provide maximum legal assistance services to soldiers and their families. For decades the guidance had been that legal assistance attorneys provide advice on taxes, but they were not charged with preparing tax returns. This began to change in the early 1980's, and by 1986 the message was that tax return preparation was to be a part of the Army's Tax Assistance Program.¹⁶⁰ Indeed, at The Judge Advocate General's suggestion, the Army Chief of Staff urged all commanders to become actively involved in ensuring that their soldiers received the assistance they required in tax preparation. The Branch developed a Model Tax Assistance Program¹⁶¹ and technical guidance for attorneys in the form of *The Legal Assistance Officers' Federal Income Tax Supplement*. At the same time the OTJAG Legal Assistance Office coordinated joint service Tax Training Teams that have travelled throughout the world to brief legal assistance attorneys on current tax law developments and to help prepare them for the tax preparation season. This instruction has been presented in Germany, in four Pacific locations, and in Panama. One estimate is that the services provided for soldiers through this program would have cost more than \$12 million from commercial tax preparers.

The belief that soldiers deserve the most professional services possible has become a hallmark of legal assistance today, and further developments in the tax assistance program highlight this approach. The Fort Bragg Legal Assistance Office participated in the Internal Revenue Service's experimental electronic tax filing program in 1987 to provide soldiers with state of the art service for their 1986 tax returns. The IRS expanded its test program in 1988, and so did the Army. At The Judge Advocate General's urging, thirteen installations and organizations developed the capability for electronic filing. Additionally, at The Judge Advocate General's request, the IRS agreed to allow legal assistance offices in Panama to participate in one of the first efforts to coordinate electronic filing from outside the United States on a special test basis.¹⁶³ The electronic filing program ensures accurate and faster filing of tax returns for soldiers and their families. This "no cost" program also speeds the federal income tax refund to the soldier.¹⁶⁴

¹⁶⁰See *Legal Assistance Items: Tax Assistance Program*, The Army Lawyer, Dec. 1985, at 39.

¹⁶¹*Id.*

¹⁶²Memorandum, DAJA-LA, 15 Sept. 1986, subject: JAGC History Update.

¹⁶³Memorandum, DAJA-LA, 12 Apr. 1988, subject: Judge Advocate General's Corps History Update.

¹⁶⁴*Id.*

The Chief of Staff's Award for Excellence in Legal Assistance was first established in October 1986 as The Judge Advocate General's Award for Excellence in Legal Assistance.¹⁶⁵ The award was presented to the commands with the best legal assistance and preventive law programs in the Army. Competition for the award was divided into two categories. The small office category was for Judge Advocate offices with fewer than ten military or civilian attorneys. Judge Advocate offices with ten or more attorneys competed in the large office category.¹⁶⁶ The winners of the award for 1986 were XVIII Airborne Corps, large office category, and the Southern European Task Force (SETAF), small office category.¹⁶⁷

In 1987 the award was changed to the Chief of Staff's Award for Excellence in Legal Assistance.¹⁶⁸ The change recognized that, although judge advocates oversee the legal assistance and preventive law programs, the programs actually are the responsibility of installation and organization commanders.¹⁶⁹ The Chief of Staff's Award for Excellence in Legal Assistance honors those commands that have committed their legal resources to help soldiers and their families with their personal legal problems.¹⁷⁰

The categories for competition were also changed beginning with the 1987 award. The categories now are large office, with fifteen or more attorneys; medium office, with three to fourteen attorneys; and small office, with one or two attorneys who generally perform legal assistance on a part-time or limited basis.¹⁷¹

The criteria for evaluating the nominees also changed. The extent and quality of a nominee's legal assistance and preventive law programs are considered, along with the office's responsiveness to clients' needs, the professionalism of the attorneys and supporting personnel, and the use of legal specialists and noncommissioned officers. The office environment, professional atmosphere, and automation are also important. Any innovations by an office that benefit the legal assistance and preventive law programs are evaluated.

¹⁶⁵Letter, Office of The Judge Advocate General, DAJA-LA, 1 Oct. 1986, subject: The Judge Advocate General's Award for Excellence in Legal Assistance.

¹⁶⁶*Id.*

¹⁶⁷*TJAGSA Practice Notes-Legal Assistance Items: Award for Excellence in Legal Assistance*, The Army Lawyer, Apr. 1987, at 37.

¹⁶⁸Memorandum from The Judge Advocate General, 2 Oct. 1987, subject: The Chief of Staff's Award for Excellence in Legal Assistance, *reprinted in* The Army Lawyer, Nov. 1987, at 4.

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹*Id.*

Although statistics may be submitted, workload is not the sole factor used to evaluate nominees. Examples of programs and information that would help other legal assistance offices may also be submitted for evaluation.¹⁷²

The Judge Advocate General appoints a board to evaluate the nominations. The President of the board is the Assistant Judge Advocate General for Military Law. The Chief, Legal Assistance Office, Office of The Judge Advocate General; the Chief, Legal Assistance Branch, The Judge Advocate General's School; one company grade judge advocate officer; and one legal specialist or noncommissioned officer are members of the board. The board recommends an office in each category to The Judge Advocate General, who selects the winners.¹⁷³

The winners of the Chief of Staff's Award for Excellence in Legal Assistance for 1987 were:

Small Office Category: Giessen Legal Center, 3d Armored Division;

Medium Office Category: United States Army Berlin; and

Large Office Category: XVIII Airborne Corps and 1st Armored Division as joint winners.¹⁷⁴

D. INTERNATIONAL AFFAIRS DIVISION

In 1982 the International Affairs Division identified the need for a forum to discuss contemporary international legal problems on a classified basis. This resulted in the Military Operations and Law Symposium, which has been conducted annually since 1982. Attendees have included senior representatives from the G-3/J-3 or G-5/S-5 offices, and staff judge advocates from all joint commands, component force headquarters, service staffs, Office of the Joint Chiefs of Staff, and Office of the Secretary of Defense. These conferences have been a forum for dialogue with the operations branch on a wide range of operational issues.

The division has also been active in resolving legal issues during military operations, and in developing major treaties. During the Grenada operation, International Affairs Division attorneys served on the crisis reaction team in the Army Operations Center. In conjunction with other judge advocates at every level, they provided

¹⁷²*Id.* at 5.

¹⁷³*Id.*

¹⁷⁴TJAGSA Practice Notes. *Legal Assistance Items: Award for Excellence in Legal Assistance for 1987*, The Army Lawyer, July 1988, at 68.

advice on targeting, treatment of prisoners, recovery of dead from the battlefield, claims, and other international issues.¹⁷⁵ The division also played a key role in coordinating with the International Committee of the Red Cross.

Lieutenant Colonel David E. Graham of the International Affairs Division served as the first legal advisor to the Multinational Peacekeeping Force in the Sinai. Colonel Graham worked on command control and other deployment issues for the international force, and accompanied the force when it deployed. He also acted as a liaison with both the Egyptian and Israeli governments. Since then, judge advocates have served as legal advisor to battalion commanders as their units served with the international force.

Between 1982 and 1985 the Joint Chiefs of Staff examined the Protocols Additional to the Geneva Conventions of 1949,¹⁷⁶ and the 1980 Conventional Weapons Convention.¹⁷⁷ The International Affairs Division was the principal author of this review. In addition, a division representative served on numerous delegations to NATO Headquarters and individual allied nations to identify and resolve interoperability questions that might arise under these treaties.

The United Nations Conference on Mercenaries took place annually in New York from 1982 to 1984. These conferences considered whether special law of war provisions were needed to cover the activities of mercenaries. An International Affairs Division attorney, who was the Department of Defense representative at these conferences, worked with representatives of other nations to identify issues that needed resolution before a new treaty was drafted.

International Affairs attorneys also participated in negotiating new agreements relating to base rights and the status of U.S. troops in foreign countries. These efforts resulted in a formal Status of Forces Agreement with the states that formerly constituted the Trust Territory of the Pacific, and an agreement with Honduras covering criminal jurisdiction over U.S. troops in that country.

¹⁷⁵See *supra* text accompanying notes 22 to 47, for a further description of judge advocate involvement in the Grenada operation.

¹⁷⁶Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I) Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S.No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S.No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), August 12, 1949, 6 U.S.T. 3316, T.I.A.S.No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S.No. 3365, 75 U.N.T.S. 287.

¹⁷⁷Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, *opened for signature* April 10, 1981, 19 I.L.M. 1523.

E. CONTRACT LAW DIVISION

On April 1, 1984, the Federal Acquisition Regulation (FAR) went into effect.¹⁷⁸ The FAR provides a uniform regulatory policy and set of procedures for federal procurement. It replaced the Defense Acquisition Regulation, the Federal Procurement Regulations, and the National Aeronautic and Space Administration Procurement Regulation. The Department of Defense and the Department of the Army have implemented the FAR with the Defense Federal Acquisition Regulation Supplement (DFARS) and the Army Federal Acquisition Regulation Supplement (AFARS).

In 1984 the Competition in Contracting Act (CICA)¹⁷⁹ changed competition and bid protest procedures. CICA placed the emphasis on competition in the contracting process rather than the type of contracting method used (e.g., sealed bid or negotiation). The Act required each contracting activity to appoint a Competition Advocate to promote full and open competition. It also gave the General Accounting Office statutory authority over bid protests, and gave the General Services Board of Contract Appeals jurisdiction over protests arising from the acquisition of data processing equipment.

F. PROCUREMENT FRAUD DIVISION

In December 1986 the Secretary of the Army established the Procurement Fraud Division to be the central organization to coordinate procurement fraud and corruption cases. The division first moved into the Bicentennial Building in Washington, D.C., established a basic system to monitor fraud cases, and obtained legal research and technical services.

During 1987, its first year, the division completed 314 suspension and debarment actions, the highest total in the Department of Defense.¹⁸⁰ These actions, along with civil litigation settlements and judgments, recovered more than \$11 million for the government.¹⁸¹ By the end of 1987 the division had 505 open cases.¹⁸²

G. AUTOMATION

Individual activities in the JAGC started automating in the late 1970's and early 1980's. Offices such as the U.S. Army Claims Service

¹⁷⁸See Exec. Order No. 12352, 3 C.F.R. 137 (1983).

¹⁷⁹Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984).

¹⁸⁰"Memorandum, Chief Procurement Fraud Division, 6 Apr. 1988, subject: Procurement Fraud.

¹⁸¹*Id.*

¹⁸²*Id.*

at Fort Meade, the U.S. Army Claims Service, Europe, the Presidio of San Francisco, and Fort Belvoir illustrate these early efforts. A systematic plan to automate the Corps, however, did not begin until 1982, when Major General Clausen established automation as a key Corps objective: "My goal is to have the JAG Corps use automation and telecommunication technologies to improve mission support and enhance our ability to render timely, accurate, and complete legal services."¹⁸³

On September 20, 1982, the JAGC Automation Management Office¹⁸⁴ was created. The office immediately began work on a plan to identify the information processes and data classes involved in JAGC operations. The plan identified the information the Corps used in both technical and administrative activities,¹⁸⁵ and became the cornerstone of the JAGC information management system. By June 1983 the Assistant Secretary of the Army for Financial Management had approved the concept for the design, development, and implementation of a JAGC-wide automation project, now known as the Legal Automation Army-Wide System (LAAWS).¹⁸⁶ By May 1984 various agencies in the Information Systems Command had assumed support responsibilities for LAAWS."¹⁸⁷

Between January and June 1986, American Management Systems, Inc., a computer research corporation, completed an automation study that established a functional description baseline, evaluated different methods of automation, prepared a project management plan, and described specifications for the hardware and software components of LAAWS. This comprehensive study has been the cornerstone for implementing the LAAWS project."¹⁸⁸

JAGC automation standards were established in April 1986. The basic component of the automation system would be an IBM-compatible personal computer capable of running both off-the-shelf software and custom software designed for JAGC functions. By the end of 1987, over two thousand personal computers were in place at judge advocate activities worldwide. Also, in April 1986 the first

¹⁸³Memorandum, Office of the Judge Advocate General, 20 Sep. 1982, subject: Project Initiation for Automated Legal Systems.

¹⁸⁴The office is now the Information Management Office.

¹⁸⁵See Judge Advocate General's Corps Information Systems Plan (May 1983).

¹⁸⁶See Judge Advocate General's *Corps* Mission Element Needs Statement (MENS) (approved 4 June 1983).

¹⁸⁷Legal Automation Army-Wide System Product Manager Charter (approved 7 May 1984).

¹⁸⁸See Rothlisberger, *LAAWS* Status Report, *The Army Lawyer*, Apr. 1987, at 15; see also Rothlisberger, *JAGC Automation Overview*, *The Army Lawyer*, Jan. 1986, at 51.

LAAWS software appeared. Forty-seven offices received a legal assistance package that created wills and powers of attorney, and managed client data. Other offices were added to the LAAWS software distribution list as they acquired the hardware necessary to run the system. Finally, in August 1986 the Army Courts-Martial Information System (ACMIS) became operational.¹⁸⁹

Since 1986 JAGC automation has continued, based on a three-tiered automation architecture.¹⁹⁰ Tier three of the system is the personal computer, the workhorse for individual users, supported by a variety of peripheral devices, such as dot matrix and laser printers, plotters, optical character readers, and modems.¹⁹¹ As each office develops at the personal computer (user) level, the individual workstations will be linked in an office automation network, tier two of the system.¹⁹² Finally, tier one will link office networks to the LAAWS central computer, which will permit sending and retrieving information such as court-martial reports, claims reports, legal assistance reports, and opinion files. This mainframe computer will be the repository for Corps-wide databases, and will provide twenty-four hour access to users; it will also link with other offices and agencies through the Defense Data Network (DDN).¹⁹³

In the last five years, automation has transformed the way judge advocates conduct their business. Word processing, two-way data transfer, and on-line links to research material are merely some examples of how indispensable computers have become. Automation will continue to enhance the Corps' ability to deliver timely, accurate, and complete legal services.

X. UNITED STATES ARMY LEGAL SERVICES AGENCY

Since it was established in 1971, the United States Army Legal Services Agency (USALSA) has become the largest legal organization in the Army.¹⁹⁴ With the addition of the Litigation and Procurement Fraud Divisions, the Agency grew to sixteen offices and divi-

¹⁸⁹See *infra* text accompanying notes 204 to 205. See generally Perrin, *Military Justice Automation*, *The Army Lawyer*, Feb. 1986, at 24, for a description of the ACMIS system.

¹⁹⁰See Dep't of Army, Pam. 25-1, *Army Information Management Program: The Army Information Architecture* (17 Sept. 1986).

¹⁹¹Rothlisberger, *LAAWS Status Report*, *supra* note 188, at 16.

¹⁹²*Id.*

¹⁹³*Id.*

¹⁹⁴Memorandum, JALS-ZX, 15 Oct. 1986, subject: JAGC History Update—USALSA [hereinafter 1986 USALSA Memorandum].

sions consisting of over **550** military and civilian personnel, with a budget in excess of \$5.1 million.¹⁹⁵ The Commander, USALSA, also acts as Chief Judge of the United States Army Court of Military Review (ACMR). The following is an update of the changes in certain principal offices, divisions, and the ACMR since 1982.

A. UNITED STATES ARMY COURT OF MILITARY REVIEW

The Army Court of Military Review has existed by that name since the Military Justice Act of 1968 became effective in August 1969. Under Article 66(a) of the Uniform Code of Military Justice,¹⁹⁶ The Judge Advocate General is responsible for establishing a court of military review, designating its chief judge, and appointing the appellate military judges. Since that time the judges have been senior judge advocates on active duty. Each panel is assigned a judge advocate, generally a captain, to serve as its commissioner. The caseload of the ACMR exceeds that of most intermediate appellate courts in the United States. Since 1982 the ACMR has, on average, reviewed over 2,500 cases per year.¹⁹⁷ In the summer of 1985 the Court produced the first Appellate Judges' Deskbook. It is a comprehensive guide to appellate writing and practice. A revised edition was published in July 1986.¹⁹⁸

B. TRIAL COUNSEL ASSISTANCE PROGRAM

The Trial Counsel Assistance Program (TCAP) completed its fifth full year of operation in fiscal year 1987. It was established in 1982 to provide advice, training, and assistance to Army trial counsel worldwide. TCAP conducts monthly two-day training courses throughout the United States, Korea, and Europe. With the implementation of the Reserve Jurisdiction Act,¹⁹⁹ a number of reservists began attending these seminars. Over 400 trial counsel attended the seminars in the last year. TCAP produces the monthly *Trial Counsel Forum* in the *USALSA Report* section of *The Army Lawyer*, as well as a monthly TCAP training memorandum for chiefs of military justice and trial counsel. In August 1986 TCAP published the *TCAP Advocacy Deskbook*, a 100-page guide to improve trial advocacy. The deskbook has

¹⁹⁵Memorandum, JALS-ZX, 14 Apr. 1988, subject: 1987 Judge Advocate General's Corps History Update [hereinafter 1988 USALSA Memorandum].

¹⁹⁶UCMJ art. 66(a).

¹⁹⁷1988 USALSA Memorandum, *supra* note 195, Tab F (Memorandum, JALS-CCZ, 17 Mar. 1988, subject: JAGC History Update).

¹⁹⁸*Id.*

¹⁹⁹See *supra* text accompanying notes 116 to 122.

quickly become an essential tool for Army prosecutors. In addition, TCAP now responds to approximately 2,000 requests for assistance from trial counsel per year.***

C. TRIAL, DEFENSE SERVICE

The Trial Defense Service (TDS) was permanently established in November 1980. It is an organization of 196 attorneys assigned to fifty-seven field offices and twenty-nine branch offices world-wide. Colonel Jerry V. Witt became Chief of TDS in September 1986.

The 1984 *Manual for Courts-Martial* required additional responsibilities of trial defense counsel, particularly in the area of post-trial representation. TDS ensured that all counsel were familiar with these new duties and were able to perform them effectively.

During 1987 TDS counsel represented 2,837 soldiers at courts-martial and 2,542 soldiers at administrative boards.²⁰¹ Counsel provided advice and assistance to another 32,112 soldiers on administrative consultations and 76,702 soldiers on Article 15 proceedings.*** TDS counsel also provided advice and counselling to clients in special investigations and in sensitive security cases.

The Trial Defense Service continued to improve the professional qualifications of all its counsel through Regional Defense Counsel workshops, frequent on-the-job training sessions, submissions to *The Army Lawyer*, and training memoranda. TDS has been actively involved in the development of guidelines to provide defense counsel services for reserve components. TDS also continued to develop its deployment capability; TDS counsel deployed to the Sinai in support of the Multi-National Force and Observers, and to Korea, Germany, and Honduras in support of major training exercises.²⁰³

D. INFORMATION MANAGEMENT OFFICE

The Information Management Office (IMO) was established in fiscal year 1983 to analyze the information processing requirements of USALSA and to program anticipated automation requirements and training. In fiscal year 1984 the USALSA computer was installed. It was a Four Phase 95 minicomputer with thirty-two terminals and twenty-four printers. Ten IBM personal computers were also installed that year. Automation growth continued through fiscal

²⁰⁰1988 USALSA Memorandum, *supra* note 195, Tab B; 1986 USALSA Memorandum, *supra* note 194.

²⁰¹1988 USALSA Memorandum, *supra* note 195, Tab D.

²⁰²*Id.*

²⁰³*Id.*

years 1985 and 1986, and by August 1986 USALSA instituted the Army Court-Martial Information System (ACMIS).²⁰⁴ This new system dramatically changed the way USALSA gathered and processed information from the field.

ACMIS has two components—the initial information collected from the field via the monthly court-martial case report, and the internal USALSA system, which tracks cases as they move through the appellate system. It generates a uniform statistical base from the collected data, which all participants in the appellate process share.

At one point USALSA operated thirty-nine Four Phase terminals and seventy personal computers in the Nassif Building. A local area network was added in fiscal year 1986 and an optical character reader was added to develop brief banks for both the Government Appellate Division (GAD) and the Defense Appellate Division (DAD). An electronic mail system now links USALSA with U.S. Army, Europe (USAREUR), using the Defense Data Network. This system is used on a daily basis, and it has speeded Contract Appeals Division's capability to respond to litigation.

The Information Management Office expanded USALSA's automation capacity during 1987 by purchasing a total of 203 advanced personal computers (IBM PC-AT compatible) to supplement the existing fifty standard personal computers already in place. In addition, the office acquired three new Unisys mini-mainframe computers to provide network and shared data base capabilities. Network communications are being handled by a new Central Office Local Area Network (CO-LAN) which permits the personal computers to communicate with the computer-assisted legal research services (e.g., Westlaw and Lexis) as well as the Unisys computer systems. The older Four Phase equipment will be phased out by mid-1988.

The Army Court-Martial Information System (ACMIS), installed in 1986 on a mainframe computer at Information Systems Command in the Pentagon, is being moved to USALSA's new mini-mainframe computers. Bringing ACMIS on board at USALSA will give the Agency greater control over use and access to this data. The revised data base will collect information on summary courts-martial and nonjudicial punishment formerly stored in the Criminal and Disciplinary Management Information System (CDIMS). CDIMS data will be used hereafter only for historical research.

USALSA established a training room with six workstations to teach automation procedures. The classroom is available for ACMIS

²⁰⁴1986 USALSA Memorandum, *supra* note 194.

training, Westlaw and Lexis training, Enable word processing training, and system development.”

E. ALL SERVICES APPELLATE JUDGES' CONFERENCE

In November 1985 the Army Court of Military Review sponsored the first annual All Services Appellate Judges' Conference. The conference brings together appellate judges from all the services and the judges from the U.S. Court of Military Appeals for a one-day series of lectures and seminars on appellate practice. The All Services Appellate Judges' Conference was hosted by the Air Force in 1986 and by the Coast Guard in 1987. In 1988 the Navy will host the conference.

F. UNIT INSIGNIA AND SHOULDER PATCH

In May 1984 the Institute of Heraldry authorized a unit insignia (crest)²⁰⁶ and shoulder patch²⁰⁷ for soldiers assigned to the U.S. Army Legal Services Agency.

The unit crest is a dark blue globe rimmed and gridlined in gold. Centered vertically on the globe is an all-gold scale balanced on a Roman sword with its point up. A white blindfold is draped from the balance bar of the scale, in front of the sword. A gold scroll surrounds the globe with the words "LEGIBUS ARMISQUE DEVOTI" (devoted to law and arms) inscribed in dark blue letters on it.²⁰⁸

The unit shoulder patch design is similar to the crest. The patch is divided into quarters of alternating dark blue and white. A Roman sword, pointed up, is centered vertically on the patch. The upper half of the patch contains a balance bar and scalepans, and a gridlined globe is on the lower half. The shape of the patch resembles a Roman shield.²⁰⁹

The colors of the JAG Corps, dark blue and white, predominate on the crest anti shoulder patch. The gold stands for excellence and achievement. The globe denotes USALSA's worldwide legal activities. The Roman sword and shield show the unit's military connection

²⁰⁵1988 USALSA Memorandum, *supra* note 195, Tab I.

²⁰⁶Letter, Institute of Heraldry, U.S. Army, DAAG-HDP-A, 8 May 1984, subject: Distinctive Unit Insignia for the United States Army Legal Services Agency [hereinafter Insignia Letter].

²⁰⁷Letter, Institute of Heraldry, U.S. Army, DAAG-HDP-A, 8 May 1984, subject: Shoulder Sleeve Insignia for the United States Army Legal Services Agency [hereinafter Shoulder Patch Letter].

²⁰⁸Insignia Letter, *supra* note 206.

²⁰⁹Shoulder Patch Letter. *supra* note 207.

and serve as a reminder of the Romans as early lawmakers. The scale is an ancient symbol of justice. The blindfold, entwining the scale and sword, unites the two into one unit of impartial military justice.²¹⁰

XI. UNITED STATES ARMY CLAIMS SERVICE

A. MEDICAL MALPRACTICE CLAIMS

In an attempt to provide help for the Army's medical malpractice claims crisis, a Memorandum of Understanding was signed by The Surgeon General and The Judge Advocate General in 1984.²¹¹ About two-thirds of the malpractice claims filed against the United States arose at the eight medical centers and three large installation hospitals. The memorandum provided for a risk management team, consisting of the risk manager, the risk manager's assistant, a medical claims judge advocate, and a medical claims investigator, to be established for the purpose of implementing a comprehensive risk management plan. The medical centers converted eight officer and eight enlisted slots to accommodate JAGC officers and legal NCO's assigned to this new program. The medical claims judge advocates initially attended a training course at The Judge Advocate General's School. The risk management plan involves, among other things, the discovery and immediate investigation of potentially compensable events as they occur. Subsequently, the medical claims judge advocate and the medical claims investigator are involved in settling those claims that appear to be meritorious, defending claims where the standard of medical care was met, and assisting in litigation. It became immediately apparent that their role benefited the quality of claims defense and continued to strengthen the efforts toward reducing patient harm. After four years of operations, the program has been pronounced an outstanding success.

B. AFFIRMATIVE CLAIMS

On June 1, 1985, the Affirmative Claims Branch was established at the U.S. Army Claims Service. This office assumed all pre-litigation supervisory responsibility for affirmative claims asserted pursuant to the Medical Care Recovery Act and for negligent third party damage to Army property. Previously, these duties had been accomplished by Litigation Division, Office of The Judge Advocate General. The

²¹⁰*Id.*; Insignia Letter, *supra* note 206.

²¹¹Memorandum of Understanding between The Surgeon General and The Judge Advocate General Relating to Legal Support for Risk Management Programs at Army Medical Centers, 8 June 1984.

Affirmative Claims Branch mission includes the monitoring of collection efforts of CONUS and overseas claims authorities, coordination with the Department of Justice, and acting on requests for compromise, waiver, and terminations where appropriate.

During the first year of operation, over \$8.9 million was collected under the Medical Care Recovery Act. This collection total was more than that of any year since the statute's enactment and almost a one-third increase over recovery efforts in 1981. Since 1981 total property damage recoveries also increased by over 100% to \$1.5 million in 1985.²¹²

C. MANAGEMENT STUDY OF U.S. ARMY CLAIMS SERVICE

The Judge Advocate General directed on September 8, 1986, that a Study Committee conduct a comprehensive evaluation of the operations of USARCS. Its purpose was to validate existing claims programs and identify courses of action to assure that USARCS provides the highest quality claims service to the Army and is able to meet the long-range requirements of the Army's claims system. The Study Committee was composed of highly-qualified officers with experience in claims administration. The Study Committee initially conducted extensive research of claims statutes, claims regulations and publications, and USARCS management procedures. The Study Committee next gathered data during a three-day on-site review of USARCS operations. In early January 1987 a Study Committee member visited USARCS, Europe, to gain the perspective of that agency. Finally, comments concerning Army claims operations were solicited from field staff judge advocates. The Study Report was completed on February 11, 1987. The Study Committee found that, while many USARCS elements were functioning in an adequate manner, some fundamental changes were needed in the way USARCS leads the Army claims system and in USARCS' own internal operations.

As a result of the study, the USARCS was reorganized in July 1987. The Foreign and Maritime Claims Division and the General Claims Division were merged and became the Tort Claims Division. A Support Services Office and Budget and Information Management Office, operating under the supervision of an Executive, were created.²¹³

²¹²Memorandum, JACS-Z, 29 Sept. 1986, subject: JAGC History Update.

²¹³Memorandum, JACS-Z, 7 Apr. 1988, subject: Judge Advocate General's Corps History Update (Tab A).

D. CHECOTAH INCIDENT

On the night of August 4, 1985, a flatbed truck owned by Explosive Transports, Incorporated, and under contract to the Army was transporting ten Mark VII 2,000 pound bombs. As the truck headed east on Interstate 40 at approximately 3:30 a.m. near the city of Checotah, Oklahoma (population 3,454), the truck collided with a 1977 Ford LTD driven by 64-year-old Dolly Mrdjenovich which pulled out directly in front of it. The resulting fire detonated seven of the bombs.

The explosion left a crater in the eastbound lanes of the Interstate which measured forty feet across and twenty-seven feet deep. The resulting air shock broke windows as far as three quarters of a mile away. Although there were few injuries, property damage was estimated at approximately \$5,000,000.

The independent contractor status of the trucking company, combined with the negligence requirement of the FTCA, insulated the Government from liability. The trucking company carried several million dollars in insurance, but refused any payment since the accident was not its fault. Ms. Mrdjenovich was uninsured and without sufficient funds to pay any judgment. In October 1986 the Oklahoma Congressional Delegation attached a rider to the 1987 Defense Appropriations Bill directing DOD to make \$5,000,000 of DOD money available to pay the citizens of Checotah for their individual losses despite the Government nonliability. From February 4 to May 5, 1987, the Fort Sill Claims Office accepted 506 claims for Checotah damages made payable by the special legislation.

Adjudication was hampered by short time limitations, a lack of substantial investigation into damages at the time of the explosion, and local publicity announcing that Army representatives would soon be in town to give away money. Most claimants requested only the \$100 or \$250 deductible that their homeowner's insurance had not paid them, but many large claims were received from various businesses and governmental entities whose losses had not been insured. The payment of these claims was the first large scale payment by the Army under the authority of private legislation since the Texas City explosions in 1963.

Captain Leo Boucher and Mr. Byron Bailey from the Fort Sill Claims Office spent several weeks in Checotah investigating and adjudicating the claims. They set up a storefront claims operation in Checotah City Hall and interviewed working claimants in their motel rooms each night after City Hall closed. By September 30, the payment deadline, 382 claimants had voluntarily settled or with-

drawn their claims, 78 subrogation claims by insurance companies had been denied, 25 final payment decisions were made by either the Commander, U.S. Army Claims Service or The Judge Advocate General, and 21 claims from individuals were denied. Payments totalled \$611,558.***

Following the denial of their claims, approximately thirty suits were filed under the FTCA by insurance companies in the Eastern District of Oklahoma. These cases were consolidated and dismissed on the government's Motion for Summary Judgment by District Judge H. Dale Cook on January 4, 1988.²¹⁵

XII. ARMY RESERVE AND NATIONAL GUARD ACTIVITIES

The citizen-soldier has been relied upon throughout history to meet the needs of the United States Army in accomplishing the Army mission. Particularly in times of crisis, the United States Army Reserve and Army National Guard have made important contributions in personnel and in expertise. The attorneys and legal specialists who perform legal services for the Army in Reserve and National Guard capacities have become invaluable over the years. They perform a variety of functions in their local communities as attorneys, public officials, educators, paralegals, and court reporters. Yet they remain ready to step into uniforms to serve the Army whenever necessary. Through annual training and continuing legal education, the lawyers and legal specialists of the Reserve and National Guard maintain their up-to-date knowledge of military law and procedures enabling them to serve both in peacetime and conflict.²¹⁶

A. JAGC RESERVE AND NATIONAL GUARD GENERALS

The position of Assistant Judge Advocate General for Operations (IMA) was held by Brigadier General Bernard H. Thorn from April 1, 1982, to April 15, 1985. General Thorn was succeeded by Brigadier General Robert H. Tips, who served from April 16, 1985, until his recent retirement on March 15, 1988. Colonel(P) James E. Ritchie currently holds this position.

In May 1980 Brigadier General William H. Gibbes became the

²¹⁴*Id.*, Tab E.

**Creek Nation Indian Housing v. United States, 677 F. Supp. 1120 (E.D. Okla. 1988).

***Park. *supra* note 2, at 45.

Chief Judge, U.S. Army Legal Services Agency (IMA). General Gibbes held that position until April 30, 1983, when he was succeeded by Brigadier General Daniel W. Fouts. On May 1, 1986, Brigadier General Thomas P. O'Brien began his tenure in this position.

The position of Army National Guard Special Assistant to The Judge Advocate General was held by Brigadier General Paul N. Cotro-Manes from 1980, when this position was created, until October 31, 1983, when General Cotro-Manes retired. Brigadier General Howard I. Manweiler was the next to fill this position, serving from November 1, 1983, to February 28, 1987. The current holder of this position is Brigadier General William F. Sherman.

B. REORGANIZATION OF THE ARMY RESERVE ACTIVITY

Originally, the Reserve judge advocates were trained solely by the Reserve unit to which they were assigned. The need for attorneys and legal specialists to train together in the area of law led to the establishment in 1958 of teams of lawyers, court reporters, and legal clerks. These teams were called the Judge Advocate General's Service Organization (JAGSO) Detachments. The JAGSO Detachments were able to maintain maximum proficiency in law to better assist their Reserve units in the capacity they were intended to serve.

The JAGSO Detachments went through another major reorganization between 1973 and 1976. At that time the concept of the Military Law Center (MLC) was formalized. Each MLC was made up of teams of legal personnel capable of providing legal services in the five functional areas of legal assistance, claims, international law, criminal law, and administrative contracts law. The MLC also included military judges. Since then the JAGSO teams have undergone several modifications.²¹⁷

The most recent reorganization is in the final stages. Pursuant to Army of Excellence (AOE) initiatives, a reorganization of the JAGSO was ordered in 1986 with the purpose of more adequately serving the increasing numbers of personnel in the Army. The reorganization began with a redesign of the Table of Organization and Equipment (TOE) that was boarded at Training and Doctrine Command (TRADOC) in August 1987 and was approved by Headquarters, Department of the Army (HQDA), in May 1988. The MLC has been re-

²¹⁷*Id.* at 46.

named the Legal Support Organization (LSO), and each LSO will be commanded by a JAGC attorney with the rank of colonel.²¹⁸

Each LSO consists of fifteen officers, one warrant officer, and eleven enlisted members who are able to offer legal services and legal support in all five of the functional areas mentioned above. To augment the LSO, functional teams are assigned to the LSO in accordance with the needs of the unit being supported. There are six types of functional teams:

1) The Legal Assistance/Claims Team is made up of three officers and three enlisted members who provide services in the two functional areas of legal assistance and claims.

2) The Administrative/Contracts Law Team is composed of three officers and two enlisted members who provide legal support in the functional area of administrativecontracts law.

3) The International/Operational Law Team has two officers and one enlisted member to work in the functional area of international law.

4) The Court-Martial Trial Team has four officers and four enlisted members who cover government representation in the functional area of criminal law.

5) The Court-Martial Defense Team has four officers and one enlisted member who perform the defense portion of the criminal law functional area.

6) Military Judges are assigned to either Senior Military Judge Teams or Military Judge Teams. The Senior Military Judges supervise the subordinate teams and members. Each team is composed of one officer and one enlisted member.

One LSO plus a Senior Military Judge Team and a Court Martial Defense Team can support 15,000troops. Functional teams are added to the LSO to support more troops, depending upon the needs of the overall unit. For example, to support 30,000troops a group consisting of one LSO, one Senior Military Judge Team, one Military Judge Team, two Court Martial Defense Teams, and one each of the four other functional teams is required. *''

²¹⁸Information Paper, JAGS-DDC, 22 Apr. 1988, subject: Redesign of Judge Advocate General's Service Organization.

²¹⁹Memorandum, ATCD-OP. 15 June 1988, subject: Organizational Documentation Update (4-88).

In 1987, during the redesign of the JAGSO into the LSO and functional team structure, a Department of the Army Inspector General Inspection Report on Mobilization noted, among other deficiencies, inadequate legal services and legal support for the mobilization effort and the land defense of the continental U.S. (CONUS). The Judge Advocate General had noted a similar shortfall and had directed that a study take place in conjunction with the JAGSO redesign. A result of that study is a proposed additional mission to the new LSO. LSO's assigned this CONUS mission would be called LSO/Regional Law Centers (LSOIRLC). The LSOIRLC will be supported by functional teams in the same manner as their OCONUS counterparts and will provide legal services and legal support on matters dealing with pre-mobilization, mobilization, and land defense of CONUS. The LSO/RLC will be an asset of the CONUSA commander and will be under the operational control and supervision of the CONUSA Staff Judge Advocate. About 500 Judge Advocate Reservists will be needed to accomplish the new LSO/RLC mission. The operational concept for this new mission structure has been approved by The Judge Advocate General and HQDA; however, an initiative to secure personnel must be presented as a separate agenda item at a formal HQDA conference in the fall of 1988.²²⁰

C. GROWTH OF JUDGE ADVOCATE RESERVE ACTNITY

Since the first reorganization of JAGSO in 1959, when 1,000 authorized spaces were established, the number of Reserve judge advocate officers has more than doubled. In April 1988 there were 1,211 judge advocate Reservists supporting units and another 968 in various non-unit judge advocate Reserve groups separate from the LSO/Functional Team structure. These non-unit reservists include 425 Reinforcement Ready Reservists who have no training obligations and seven Standby Reservists. In addition, there is a large group of 536 non-unit judge advocate Ready Reservists known as Individual Mobilization Augmentees (IMA).

The purpose of the Individual Mobilization Augmentee Program, formerly called Mobilization Designee (MOB DES) Program, is to provide the capability for rapid expansion of the Army from a peacetime to an emergency or wartime basis by increasing the size of the active Army with United

²²⁰Information Paper, JAGS-DDC, 22 Apr. 1988, subject: Operational Concept for the Provision of Legal Services and Legal Support for Mobilization and Land Defense of CONUS.

States Army Reserve officers. The success of rapid and effective mobilization of tactical forces will depend, in large measure, on the Army's capability to rapidly expand its administrative and logistical support structures. An essential aspect of this requirement is that the Ready Reserve, through the Individual Mobilization Augmentee Program, provides a substantial number of preselected and trained officers who can report for active duty, with minimal delay, to organizations that must rapidly increase their capabilities to perform crucial tasks during the early phases of mobilization.²²¹

The IMA program is one of the fastest growing parts of the Army Ready Reserve. There are many incentives for individuals interested in joining the Ready Reserve to apply for an IMA assignment. For example, an IMA has advance knowledge of the initial assignment and location in the event of mobilization, an opportunity to find a position that matches the individual's principal field of interest and ability so as to increase expertise, and flexibility in coordinating dates for performing annual training during the fiscal year.

IMA judge advocates, like other judge advocate Reservists, must meet the minimum time in service and time in grade requirements to be promoted. The minimum times change periodically and are listed in *A Career in the Reserve Components*, published by the JAGC Guard and Reserve Affairs Department at The Judge Advocate General's School. Educational requirements for promotion are as follows: for promotion to Captain—completion of the Basic Course; for promotion to Major—completion of the Advanced Course; for promotion to Lieutenant Colonel—half of the Command and General Staff Course; for promotion to Colonel—completion of the Command and General Staff Course. All of the courses are available by correspondence.²²²

In such a fast growing organization there is the problem of keeping track of expertise in order to make full use of Reserve JAGC resources. This problem has been reduced significantly by the professional qualifications database newly established by the JAGC Guard and Reserve Affairs Department at The Judge Advocate General's School. The database includes information on bar admissions, nature of civilian employment, professional experience, publications authored, foreign language capability, and current military assign-

²²¹ *A Career in the Reserve Components* at 8 (Mar.1988).

²²² *Id.*

ment. By 1987 information on about 1,400 officers was included in the database.²²³

D. RECENT MAJOR EVENTS

1. Legislation Affecting Reservists

In addition to the previously discussed legislation concerning UCMJ jurisdiction over Reservists, new malpractice legislation²²⁴ was enacted on November 14, 1986. This legislation should reduce concerns of judge advocate Reservists who provide legal assistance to soldiers. Before this legislation, there was a fear that malpractice claims against judge advocate Reservists would not always result in representation and payment of judgments by the Department of Justice. Additionally, private malpractice insurance often covers only fee-generating cases. The new statute provides that the United States Attorney General will defend any civil action for damages for injury or loss of property caused by the negligent or wrongful act or omission of any attorney, paralegal, or other member of a legal staff within the Department of Defense. The negligent or wrongful act must be within the scope of the duties or employment of the attorney or legal specialist. National Guard and Reserve judge advocates should promptly furnish copies of any process served on them to the local U.S. District Attorney, the Attorney General, and to the head of the agency concerned.

2. Reserve Special Legal Assistance Officers

In 1983 The Judge Advocate General authorized the Reserve Judge Advocate Legal Advisory Committee. The Committee, made up of judge advocate Reservists from each state, is responsible for assisting The Judge Advocate General's School Legal Assistance Branch with updating the All States Guides; assisting with the publication of other texts; submitting reports on recent developments in the legal assistance area; providing model forms; and answering specific state law questions submitted from the Legal Assistance Branch. Retirement points are available for work performed by these volunteer committee members. The Legal Advisory Committee is especially suitable for IMA Reservists, who will receive retirement credit and be designated as Special Legal Assistance Officers (SLAO).²²⁵

²²³*Guard and Reserve Affairs Item: JAGC Reserve Professional Qualifications Database*, The Army Lawyer, March 1987, at 61.

²²⁴10 U.S.C. § 1054 (Supp. IV 1986). See also *Guard and Reserve Affairs Item: Legal Malpractice Legislation*, The Army Lawyer, Jan. 1987, at 49.

²²⁵*Reserve Judge Advocate Legal Assistance Advisory Committee*, Alumni Newsletter, The Judge Advocate General's School, Summer 1983, at 6.

Judge advocate Reservists may apply to be designated as SLAO's under Army Regulation 27-3.²²⁶ These SLAO's make up a network of attorneys available to assist soldiers and dependents free of charge. The SLAO's earn retirement points for services rendered and need not be in a training or duty status to provide services out of their private law practice. Most importantly, the SLAO may provide representation in court as long as the case and the client qualify for court representation. In 1986 there were about 150 SLAO's appointed. They are listed in the Army Legal Assistance Information Directory which is updated periodically. SLAO's are contacted directly by the active duty judge advocate or by the client.

3. Reserve Assistance After the Gander Crash

The tragic air crash in Gander, Newfoundland, which resulted in 248 deaths of 101st Airborne Division soldiers was an opportunity for judge advocate Reservists to prove how invaluable they can be in times of crisis. Primary next of kin of the crash victims were authorized legal assistance. For those relatives who were not located near an active duty Army post, Reserve judge advocates were designated to provide legal assistance. Services included probating wills, filing letters of administration, having guardians ad litem appointed, assisting with survivor benefits, and advising family members regarding settlement offers. By the spring of 1986, twenty-five Reserve judge advocates provided outstanding service to more than thirty-five families coast to coast.²²⁷

E, THE ARMY NATIONAL GUARD JUDGE ADVOCATES

The National Guard celebrated its 350th birthday on December 13, 1986. In 1636 the General Court of Boston authorized the organization of the first militiamen. Around 1824 the New York militia named one of their units the National Guard; and after the Civil War, the term was applied to all organized militia units. Judge advocates have played a significant role in the National Guard from the very beginning. The first three Judge Advocate Generals were militiamen.

The Army National Guard presently has approximately 592 judge advocate positions. All Army National Guard judge advocate positions are Troop Program Units, including 128 in combat divisions, 81 in infantry brigades, 19 in separate armored brigades, and 12 in engineer brigades. Of the

²²⁶Army Reg. 27-3, Legal Services: Legal Assistance (1 Apr. 1984).

²²⁷See *infra* text accompanying notes 48 to 57.

remaining 352 positions, 218 are found in **54** state and territorial commands and 134 are in smaller combat or combat support units.²²⁸

Recent reorganization of the Guard has resulted in the State Area Command (STARC), units of Guard Judge Advocates that will stay behind in the event of mobilization to take care of legal issues within CONUS. Other judge advocates in the Army National Guard will deploy with their combat units.²²⁹

The National Guard judge advocates have begun to provide on-site continuing legal education programs. The most recent were successfully concluded in April, 1988, including a program in San Juan, Puerto Rico, in administrative/civil law and criminal law, and one in New Orleans, Louisiana, in administrative/civil law and international law. The National Guard plans to increase its role in providing local on-site continuing legal education in the future.²³⁰

Several recent legal battles have significantly clarified the role of the Army National Guard. Members of the National Guard cannot be ordered to active duty without the consent of the governor of the state.²³¹ In 1985 and 1986 several governors withheld their consent to deploy their National Guard units to Central America. Congress attempted to resolve this problem with an amendment to the statute that prohibited a governor from withholding consent regarding active duty outside the United States because of objections to the location, purpose, type, or schedule of the active duty.²³² The legislation resulted in two cases challenging the constitutionality of that amendment. The first, brought by the governor of the State of Minnesota, was decided in the United States District Court in Minnesota in favor of the Department of Defense on August 4, 1987. The court decided that the duty of providing for the national defense, including the use of the militia for national defense, has resided in Congress since the beginning of the nation.²³³ The second case was decided by the United States District Court in Massachusetts on May 6, 1988, with similar results.²³⁴ These two cases secure the role that the Army National

²²⁸*The Judge Advocate General's Corps and the National Guard*, Alumni Newsletter, The Judge Advocate General's School, Spring 1986, at 6.

²²⁹Interview with Colonel Benjamin A. Sims, Director JA Guard and Reserve Affairs Department, The Judge Advocate General's School (May 1988).

²³⁰*Id.* See also Continuing Legal Education On-Site Plan 1988.

²³¹10 U.S.C. § 672(b) and (d) (1982).

²³²10 U.S.C. § 672(f) (Supp. IV 1986).

²³³*Perpich v. Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987).

²³⁴*Dukakis v. Dep't of Defense*, 56 U.S.L.W. 2665 (D. Mass. May 6, 1988).

Guard will play in all future efforts toward the national defense, both in training and in actual conflict.

XIII. THE UNITED STATES COURT OF MILITARY APPEALS

The United States Court of Military Appeals has been in existence since 1951 following its Congressional creation under article 67 of the Uniform Code of Military Justice.²³⁵ Although the court operates independently of the Department of Defense, it continues to have a dramatic impact on the direction and practice of military criminal law.

A. THE JUDGES

The membership of the Court of Military Appeals in 1982 consisted of Chief Judge Robinson O. Everett, Judge William H. Cook, and Judge Albert B. Fletcher, Jr.

Chief Judge Everett assumed his position on April 16, 1980, becoming the fifth Chief Judge of the United States Court of Military Appeals.²³⁶ Chief Judge Everett was born in Durham, North Carolina. He commenced his undergraduate work at the University of North Carolina and later transferred and received his A.B. degree from Harvard in 1947. He attended Harvard Law School, where he served on the *Harvard Law Review* and graduated *magna cum laude* in 1950.

Chief Judge Everett served on active duty in the Air Force as a Lieutenant and judge advocate for two years and retired from the Air Force Reserve in 1978 as a Colonel. Following his active military service Judge Everett served as a commissioner on the Court of Military Appeals and in 1955 returned to private practice in Durham, North Carolina.

Chief Judge Everett served on the faculty of Duke Law School, obtained his LL.M. degree from Duke in 1959, and became a full tenured professor at Duke in 1967. He held this position at the time he joined the Court of Military Appeals.

Judge Everett maintained a close affiliation with military law prior to joining the court. He served as part-time counsel to the Sub-

²³⁵UCMJ art. 67; Historical Note: The United States Court of Military Appeals. 1 C.M.R. vii (1951-1952).

²³⁶The United States Court of Military Appeals (1982).

committee on Constitutional Rights of the Senate Committee on the Judiciary from 1961 to 1964, and served as a consultant for the subcommittee from 1964 to 1966. In these positions Chief Judge Everett participated in proceedings leading to the Military Justice Act of 1968. He was also a member of the American Bar Association Standing Committee on Military Law from 1973 to 1977 and served as chairman of the committee from 1977 to 1979.²³⁷

Judge William H. Cook was initially appointed to the Court on August 24, 1974. He retired on March 31, 1984.²³⁸ His long service on the bench provided a balance to the court. While concerned for the rights of servicemembers, Judge Cook's opinions often emphasized the need for rules which enhanced good order and discipline in the Armed Forces. Judge Cook's legal philosophy consisted of a strict constructionist approach to the Uniform Code of Military Justice and a belief in the central role of the commander in the military justice process.²³⁹ Judge Cook often played the role of dissenter, and in many cases his dissent was forceful and direct.²⁴⁰

Judge Cook's retirement left a vacancy which was filled by Judge Walter Thompson Cox III. Judge Cox is a native of South Carolina and a graduate of Clemson University. He attended the University of South Carolina School of Law and graduated *cum laude* in 1967. Judge Cox served in the United States Army Judge Advocate Gener-

²³⁷*Biography of Robinson O. Everett: Hearings on Dep't of Defense Appropriations for 1986 Before Subcomm. of the House Comm. on Appropriations, 99th Cong., 1st Sess.* 451 (1985); *New Chief Judge for USCMA*, Judge Advocates Association Newsletter, June 1980, at 1.

²³⁸Annual Report of the U.S. Court of Military Appeals, October 1, 1983, to September 30, 1984, 20 M.J. at CXXII [hereinafter Annual Report of C.M.A.].

²³⁹Retirement Ceremony for the Honorable William Holmes Cook, March 30, 1984, 18 M.J. 1; *CMA Judge Critical of Lawyers' Wider Role*, Army Times, October 31, 1983, at 25.

²⁴⁰In the area of multiplicity Judge Cook added some colorful language to his dissents. In *United States v. Zupanic*, 18 M.J. 387 (C.M.A. 1984), Senior Judge Cook added: "How trial practitioners can be expected to proceed in implementing the myriad fickle rules propounded by this Court, in light of my Brothers' failure to follow even their own dictates, is beyond me." (Footnotes omitted). *Zupanic*, 18 M.J. at 393. In *United States v. Baker*, 14 M.J. 361 (C.M.A. 1985) Judge Cook chided his brethren and referred to the current state of multiplicity as a "mess," and a "Sargasso Sea." *Baker*, 14 M.J. at 372-373. See also *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). *Allen* held that, in light of a Department of Defense Instruction, the accused was entitled to sentence credit for pretrial confinement. Senior Judge Cook expressed concern over the "double benefit" an accused would receive and noted that this was "the absurd result my Brothers have now achieved." *Allen*, 17 M.J. at 130. In *United States v. Clevidence*, 14 M.J. 17 (C.M.A. 1982), he stated, "What I feared would happen when we abandoned the rule of *Dunlap v. Convening Authority*, . . . has come to pass. . . . In rejecting a rule certain in its application we have created in its place a rule totally without definition." *Clevidence*, 14 M.J. at 19.

al's Corps from 1967 to 1972, served in private practice in South Carolina from 1973 to 1978, and was elected as Judge for the 10th Judicial Circuit, South Carolina in April 1978. He held this position until joining the court on September 6, 1984.²⁴¹

On September 11, 1985, Judge Albert B. Fletcher, Jr., was removed from the court by the President of the United States due to reasons of physical disability.²⁴² Judge Fletcher had served on the Court of Military Appeals since he was named Chief Judge on April 14, 1975. When Chief Judge Everett assumed his position on April 16, 1980, Judge Fletcher remained on the court as an associate judge.²⁴³

Judge Fletcher's retirement ended a twenty month period in which only Chief Judge Everett and Judge Cox actively served on the court and decided cases.²⁴⁴ The Court of Military Appeals again became a true three judge appellate court on June 6, 1986, when Eugene R. Sullivan was installed as an associate judge on the court, replacing Judge Fletcher.²⁴⁵

Judge Sullivan's background reflects extensive governmental service. He graduated from the United States Military Academy in 1964 and served in the United States Army from 1964 to 1969, including a tour of duty in Vietnam. After leaving the service, he obtained his law degree from Georgetown University, where he also served as editor of the *Georgetown Law Journal*. Judge Sullivan clerked for the Eighth Circuit Court of Appeals and also engaged in private practice in Washington, D.C. Beginning in 1974 he held several positions, to include serving in the White House Office of Special Counsel, and practicing as a trial lawyer in the Justice Department. He later became Deputy General Counsel of the United States Air Force and in 1983 was appointed General Counsel of the Air Force. Judge Sullivan also holds the rank of lieutenant colonel as an Army Reserve judge advocate.²⁴⁶ While military experience is not a prerequisite for appointment to the court, all three judges of the current court have prior judge advocate experience.

**Annual Report of C.M.A., *supra* note 239, at CXXII; *Nomination of Walter T. Cox III, To Be a Judge of the U.S. Court of Military Appeals, Hearing Before the Senate Comm. on Armed Services*, 98th Cong., 2d Sess. (1984).

²⁴²Court Notice, *Daily Journal*, Sept. 11, 1985, 21 M.J. 30 (C.M.A. 1985).

²⁴³Historical Note: The United States Court of Military Appeals, 50 C.M.R. VII (1975); Park, *supra* note 2, at 66.

²⁴⁴Judge Fletcher recused himself from acting on pending cases after being arrested on October 24, 1984. 12 Mil. L. Rep. (Pub. L. Educ. Inst.) 1121 (July-Aug. 1984).

²⁴⁵*Sullivan Becomes Third Judge on Court of Military Appeals*, *Army Times*, 23 June 1986, at 10.

²⁴⁶*Welcome, Judge Sullivan*, 18 The Dicta 51 (10 June 1986); United States Air Force, Office of Public Affairs, Eugene R. Sullivan. Biography (Feb. 1985).

B. THE COURT'S FUTURE

The Court of Military Appeals has since its creation remained a three judge military appellate tribunal with a set jurisdiction and limited terms of office for the judges. Chief Judge Everett, however, has advocated changing the status of the court from an article I to an article III court. This change would give the Court of Military Appeals all the power and authority of a federal circuit court of appeals and would change the tenure of the judges from the current fifteen year terms to life tenure. Judge Everett believes this change will enhance the prestige of the court. He also feels that life tenure will help attract high quality judges for future vacancies and ensure the independence of the court.²⁴⁷

The future status or work of the court cannot be accurately predicted. The addition of Judge Sullivan will provide some change, particularly in areas where Chief Judge Everett and Judge Cox have agreed on the result in a case but not the rationale of certain holdings.²⁴⁸ The court, however, will remain the "Everett court." The Chief Judge's law professor background will continue to dictate his style in opinion writing,²⁴⁹ and his sense of fairness and concern for the integrity of the military justice system will flavor the continuing work of the court.

²⁴⁷Address by Chief Judge Everett, to the American Bar Association, Detroit, Michigan (Feb. 15, 1985). Judge Everett also favors increasing the jurisdiction of the court to include the power to review summary courts-martial, nonjudicial punishment actions, and military board proceedings. Everett, *Some Observations on Appellate Review of Court-Martial Convictions — Past, Present and Future*, Fed. Bar News and J. 420 (Dec. 1984). See also *Important Cases Waiting for Full CMA Bench*, Army Times, September 30, 1985, at 28; Pottorff, *The Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?*, The Army Lawyer, May 1985, at 1.

In the area of evidence, for example, the Court of Military Appeals frequently cites federal precedent in interpreting the Military Rules of Evidence and has consciously followed the lead of the Supreme Court's constitutional decisions. See, e.g., *Goodson*, 105 S. Ct. at 2129. The Supreme Court tacitly has treated the Court of Military Appeals as a federal circuit court of appeals. The Supreme Court denied a petition for certiorari in the case of *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986), which addressed blood splatter expert testimony, the *Frye* test, and Mil. R. Evid. 702. Justices White and Brennan dissented. They cited conflicts between *other circuits* and stated they would grant certiorari to resolve the issue. *Mustafa v. United States*, 55 U.S.L.W. 3334 (U.S. Nov. 10, 1986) (No. 86-143).

²⁴⁸See, e.g., *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986) (multiplicity); *United States v. Watkins*, 21 M.J. 224 (C.M.A. 1986) (admissibility of uncharged misconduct).

²⁴⁹Chief Judge Everett often traces the development of the law in his opinions, providing a historical approach on many issues. See, e.g., *United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986) (development of the felony murder rule); *United States v. Gniibus*, 21 M.J. 1 (C.M.A. 1985) (development of rights to counsel for the military accused).

XIV. JUDGE ADVOCATES OVERSEAS

A. *EUROPE*

1. *Legal Issues*

a. *International Law*

The fortieth anniversary of the end of World War II and the fortieth anniversary of the presence of U.S. Forces in Germany occurred in 1985. The practice of law in Europe changes as the realities of the war and the post-war occupation of Germany fade into history. This change has had, and will continue to have, a great impact on the day-to-day work of judge advocates in Europe. New questions are raised each day about the presence of U.S. Forces. U.S. answers to these questions are increasingly challenged by a new generation of Europeans.

The essential legal basis for the status of our forces in Germany remains the NATO SOFA²⁵⁰ and the German Supplementary Agreement.²⁵¹ As these agreements age, they are subject to new questions and new interpretations. There is nothing inherently wrong with such challenges; in fact, it is a positive sign when allies in an alliance composed of democracies can argue their respective interpretation of the treaty in a free and cordial manner. These disagreements serve as evidence of the new approach to legal questions by many Germans.

b. *International Agreements*

As indicated above, issues of international law are of great concern. The USAREUR Judge Advocate's Office (OJA) performs many roles. OJA provides advice on all legal issues of importance to USAREUR. However, OJA also became involved in the actual negotiation of various agreements. For example, no mention of privately owned firearms (POF) is found in the NATO SOFA or the Supplementary Agreement. Over the years USAREUR had established a system for the registration of these weapons. The early 1980's brought threatened prosecutions against individuals for failing to register their POF's with the Germans. On the initiative of OJA, the Germans

²⁵⁰Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (entered into force August 23, 1953).

²⁵¹Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter Supplementary Agreement].

were urged to enter into an agreement, in effect, legitimizing the existing USAREUR registration system. LTC Paul Seibold, Chief of the International Law Division from 1980 to 1983, was instrumental in drafting and negotiating the final agreement. In 1985 an agreement was signed with the German Federal Government which recognized USAREUR as the proper registration authority for weapons owned by members of the forces, the civilian component and their dependents.²⁵²

c. Terrorism

Demonstrations directed against the American forces in Germany and the deployment of various new weapon systems began to increase in 1982. Concern over the authority of the commander to control the installation and to cooperate with the German authorities in case of an incident occurring outside the installation led to increased legal action at all levels. USAREUR, with OJA input and review, developed an Operations Order (OPORD) to govern demonstrations. This OPORD was intended to be a sole source document for resolving issues related to demonstrations. This OPORD was distributed to all USAREUR judge advocates. Each staff judge advocate coordinated with the local commander in implementing the order. The thrust of the order was that control of demonstrators is, primarily, a problem for host nation authorities.

Along with the increase in demonstrations came an increased awareness of terrorism and terrorist incidents. USAREUR recognized that, in most cases, demonstrators were individuals acting legally. Terrorism, by definition, however, involves individuals acting illegally. Thus, the legal issues involving terrorist incidents were different than those related to demonstrations. Nonetheless, USAREUR, given the success of its program with regard to demonstrations, developed an OPORD designed to cover terrorist incidents. OJA USAREUR was involved in the preparation of the order from the beginning. After thorough staffing within USAREUR, the order was distributed to the field. SJA's were directed to work closely with other members of their respective staffs, community commanders, and German authorities in implementing the terrorism order. Concern over terrorism also led to a proposal to use German license plates on privately owned vehicles in lieu of the existing USAREUR plate system. The USAREUR license plate system is based upon Article 10 of the Supplementary Agreement. To substitute German license

²⁵²The agreement is maintained in the files of the International Law Division, OJA, HQ USAREUR.

plates for the USAREUR plates raised the possibility of abrogating U.S. rights and privileges under Article 10. The USAREUR approach was to develop a system which would retain the benefits of Article 10 of the Supplementary Agreement and, at the same time, permit the use of German license plates on privately owned vehicles. While it is unclear at this time whether or not such an agreement can be reached, it is important to recognize that the USAREUR Judge Advocate was involved as a key player in this intense negotiation effort. The Judge Advocate was asked to develop proposals, draft agreements, and participate in the negotiation process.

d. The Nicholson Negotiations

The killing of Major Arthur D. Nicholson by a Soviet soldier on March 24, 1985, had extensive political and legal ramifications.²⁵³ An arrangement designed to prevent such incidents in the future was staffed at the highest levels of both governments. At the time of his death, Major Nicholson was assigned to the U.S. Military Liaison Mission, which is accredited to the Commander, Group Soviet Forces Germany. The Military Liaison Mission is provided for in the 1947 Huebner-Malinin Agreement, which was written in the occupation era.²⁵⁴ The liaison system serves as a means for each side to maintain contacts with the other. With the approval of the National Command Authority in Washington, a negotiating team was assembled to meet with the Soviets. Its mission was to resolve issues related to the death of Major Nicholson, obtain an apology, payment of compensation, and prevent a recurrence of such an incident. Lieutenant Colonel H. Wayne Elliott, Chief, International Law Division, was a member of this team. The International Law Division, OJA USAREUR, prepared numerous legal memoranda, wrote opening and closing statements, analyzed the Soviet proposals, and made recommendations as to negotiating strategy. After a year of intensive negotiation, study, and reports, the negotiators agreed, on April 10, 1986, to certain proposals intended to prevent a repetition of such incidents. The document was signed by Major General Roger Price for the U.S. and General-Major Leonid K. Bugrov for the Soviet Union. Prior to signature a review of the Russian and English drafts revealed a difference in format. This seemingly inconsequential difference led to extensive

²⁵³The murder of Major Nicholson was widely reported at the time. Major Nicholson was shot near Ludwigslust, East Germany, while on an authorized mission. The area in which he was shot was open to members of the Military Liaison Mission at the time.

²⁵⁴The Huebner-Malinin agreement authorized the exchange of Military Liaison Missions between the Soviet and U.S. headquarters in Germany. The agreement sets out general guidelines for their activities and the support to be provided each mission.

negotiations. Lieutenant Colonel Elliott, as the only lawyer on either side, was finally called upon by General Bugrov to provide an opinion as to whether this difference in formatting had a legal consequence. After being advised that this difference, given the negotiating history, would have no legal effect, General Bugrov agreed to sign the text. He insisted, however, that Lieutenant Colonel Elliott sign the back of both versions, confirming that the English and Russian texts were equally authentic. Bugrov also insisted that the statement be handwritten and reflect that Lieutenant Colonel Elliott was a lawyer. This experience may be the first post-war case of a U.S. Army judge advocate providing legal advice to a Soviet officer.

The final document serves as the basis for new instructions to both the American and Soviet armies and is designed to prevent a repetition of the Nicholson incident.

e. Renewed Interest in the Law of War

OJA USAREUR developed several new law of war publications, the most important of which is USAREUR Regulation **27-8**. This regulation mandates that all operations plans, standing operating procedures, policies, directives, or rules of engagement governing the war-time conduct of USAREUR forces be reviewed by a judge advocate. The regulation also requires all staff judge advocates to establish procedures to insure that alleged violations of the law of war are reported. In addition, OJA USAREUR published a pamphlet dealing with law of war training. The pamphlet is written in ARTEP format. Finally, a training game, titled "Operation Katyusha," was developed. This game was distributed to staff judge advocate offices and is intended to be a new teaching vehicle with a different methodology for discussing the law of war in a classroom setting.

f. SOFA in German Courts

German courts have been interpreting the NATO Status of Forces Agreement, the Supplementary Agreement, and the other agreements governing our presence and status in Germany for many years. On the highly political and crucial issues, such as the legitimacy under the German Basic Law (the German equivalent of the Constitution) of the stationing on German soil of the Pershing II missiles, the German courts are solidly behind our presence there. On December **18, 1984**, the Federal Constitutional Court struck down a constitutional challenge to the stationing of Pershing II missiles in the Federal Republic,²⁵⁵ basing its decision on the **1954** Convention on

²⁵⁵File Number: 2 Bv ED 13/83.

Relations²⁵⁶ and the 1954 Convention on the Presence of Foreign Forces in the Federal Republic of Germany.²⁵⁷ As we move away from politically sensitive issues, however, our privileges, powers, and immunities are not faring as well in the German courts. On July 19, 1984, the German Federal Supreme Labor Court held that locally hired American employees of military banking facilities, exclusively serving the U.S. Forces and enjoying status under Article 72 of the NATO SOFA Supplementary Agreement,²⁵⁸ were subject to German labor legislation governing labor management relations.²⁵⁹ On November 26, 1985, the Federal Supreme Social Court rejected the contention of a U.S. Forces contractor that the Forces have the right under Article 73 of the NATO SOFA Supplementary Agreement²⁶⁰ to make "technical expert" status determinations, with respect to contractor employees, which are binding on German administrative authorities.²⁶¹ The court found that it had jurisdiction to review such status determinations and that German agencies charged with social health and work accident insurance administration were not bound by U.S. determinations of status. Finally, on August 28, 1985, the Administrative Court of Appeals for the State of Hesse upheld issuance of a temporary injunction prohibiting the German Ministry of Defense from giving its consent to the reconstruction by the U.S. Forces of a firing range at the Wildflecken Training Area.²⁶² The temporary injunction still blocks construction. In the temporary injunction proceedings, the Administrative Court of Appeals held that, because German officials are bound to follow German law, the Federal Government may not give its consent to U.S. Forces construction unless the planned construction conforms to German environmental law requirements. The court found that the plaintiffs had made a *prima facie* showing that the construction would not conform to the requirements of the law with respect to noise. The Federal Emissions Control

²⁵⁶Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425, 331 U.N.T.S. 253.

²⁵⁷Convention on the Presence of Foreign Forces in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 5689, T.I.A.S. No. 3426, 334 U.N.T.S. 3.

²⁵⁸Article 72 permits the sending state forces to maintain banking facilities. This is done by contracting with U.S. banking corporations. Supplementary Agreement, *supra* note 251.

²⁵⁹Betriebsrat der Hauptverwaltung der American Express International Banking Corporation vs. American Express International Banking Corporation, File Number: 1 ABR 65/82, 19 June 1984.

"Article 73 provides that "technical experts" can be given status equivalent to that of members of the civilian component. Supplementary Agreement, *supra* note 251.

²⁶¹Federal Electric International Incorporated vs. Allgemeine Ortskrankenkasse Kaiserslautern, File Number: 12 RK 40183, 26 November 1985.

²⁶²File Number: 9 Senat, 9 TG 2605/84.

Law is the centerpiece of German environmental legislation. Its applicability to U.S. Forces activities has been a matter of contention. The German courts are beginning to find gaps in what had been considered an absolute privilege of the U.S. Forces to build whatever they determined necessary upon installations made available to them by the German government. The forces are now faced with considerations of German decibel levels and noise measurements, which are new experiences for USAREUR. The last word has not yet been written on the Wildflecken litigation. A hearing for a permanent injunction, which will require plaintiffs to produce more evidence than that required for a temporary injunction, is to be scheduled. Both parties have filed their pleadings, and the Ministry of Defense is exploring the possibility of a settlement. The issue has received public attention at the national level and coincides with other recent environmental legislation and controversy dealing with nuclear power and airport construction. These developments in the field of German environmental law are having an effect on the way the courts construe treaties and other international agreements governing U.S. stationing in Germany.

2. Delivery of Legal Services in USAREUR

On January 27, 1984, the Commander in Chief, USAREUR, appointed the Chief Judge of the 5th Judicial Circuit to inquire into the organization of USAREUR judge advocate offices and evaluate the delivery of legal services. The investigation included a review of the branch legal offices and their supervisory relationship to the sponsoring SJA. Although the investigation revealed minor problems with the staffing and organization of branch legal offices, the investigating officer concluded that USAREUR judge advocate offices were better organized and staffed to provide legal advice than ever before. This investigation will serve as a model for the evaluation of future USAREUR judge advocate activities.

3. U.S. Army Claims Service, Europe

The U.S. Army Claims Service, Europe (USACSEUR) is the USAREUR command claims office and is part of the Office of the USAREUR Judge Advocate. One of its responsibilities includes single service responsibility for processing all tort and maneuver damage claims arising within the Federal Republic of Germany, Belgium, and France that are asserted against the United States. During fiscal years 1980 to 1985, annual reimbursements by the U.S. for these claims ranged from \$30.0 to \$48.1 million. These amounts represent the U.S. share of the total assessed cost, which is generally seventy-five per cent of actual damages.

USACSEUR also has single service responsibility for processing all "ex-gratia" claims arising in Belgium, France, and the Federal Republic of Germany. These claims involve torts committed by U.S. forces personnel outside the scope of their employment and are adjudicated by a U.S. foreign claims commission. During fiscal years 1980 to 1985, between 748 and 1440 claims were processed annually with annual payments ranging between \$229,097 and \$607,729. These claims are paid in their entirety by the U.S. Government.

4. Automation

The power and availability of the microcomputer brought new solutions to familiar challenges of expanding missions, shrinking resources, and the desire to improve legal services. Judge advocate offices worldwide began using automation to improve productivity. By using modern technology, USAREUR began to work smarter and provide better answers.

In 1984 a theater-wide effort began within the USAREUR JA community to establish a communications network using microcomputers with modems. The first phase, acquisition of compatible hardware and software in each of the sixty USAREUR judge advocate offices, is nearly completed. In the future, USAREUR will work to electronically link all office systems and bring CONUS based commercial legal research services to all USAREUR attorneys.

5. Summary

The practice of law in Europe continues to be rewarding and challenging. With one-third of the Army stationed overseas it is crucial that all judge advocates appreciate the differences involved in solving legal problems overseas. Political as well as legal issues must be considered. A European assignment is an important part of any judge advocate's career.

B. KOREA

1. Area Court-Martial Jurisdiction

Like units deployed in Europe, but on a smaller geographical scale, United States Army units stationed in the Republic of Korea are spread throughout the Peninsula. As in Europe, processing military justice and related actions was often slow and cumbersome as cases moved back and forth through the chain of command, sometimes traversing the length of the country. After studying the apparent advantages of the system of area jurisdiction in Europe, in place since

1972, the decision was made in late 1983 to staff an action based on the USAREUR model. Approved in the spring of 1984, it went into effect on June 15, 1984, with publication of a revised EUSA Supplement to AR 27-10, Military Justice. The goal was to enhance the efficiency of the military justice system while preserving, to the extent possible, jurisdiction on a chain of command basis. The result was a hybrid in which there are three general court-martial convening authorities. The Commander, 2d Infantry Division, exercises UCMJ jurisdiction over all divisional troops wherever located, and over certain nondivisional units located in his defined area; the Commander, Combined Field Army (ROK/US), exercises jurisdiction almost exclusively on an area basis over nondivisional units in the northern half of the peninsula; and the Commander, 19th Support Command, exercises jurisdiction over units in the southern one-half of the Republic of Korea. There are twenty-four special court-martial convening authorities; seven exercise jurisdiction on an area basis, the remainder on a chain of command basis. This system has produced good results. Processing times have dropped, and current commanders are generally satisfied with its operation. Since area jurisdiction and more streamlined court-martial practice under the 1984 *Manual for Courts-Martial* were instituted virtually together, it is impossible to apportion increased processing efficiencies between the two. During 1985, however, EUSA court-martial processing times have consistently led all Army major commands. The system is

2. *Deployment Planning*

Integration of Army Reserve Military Law Centers and Judge Advocate Service Organizations into contingency planning in Korea is progressing. In accordance with Army CAPSTONE doctrine, planning guidance was issued by the Headquarters, Eighth Army, to the Commander, 6th Military Law Center, in May 1986. That unit was tasked to provide further guidance to JAG detachments attached to it. In addition, military law centers and detachments CAPSTONED to Korea have continued to train with active forces in Korea during exercise Team Spirit and command post exercise Ulchi Focus Lens. Operational law and judge advocate planning for transition to war have taken on increased significance and will remain a priority mission of the USFK Judge Advocate and staff judge advocates.²⁶⁴

Providing legal services in the theater of operations remained a

**Memorandum, JAJ-CL, 3 Oct. 1986, subject: JAGC History Update at 3 [hereinafter 1986 Eighth Army Memorandum],

²⁶⁴*Id.* at 4.

priority matter through 1987. Several refinements were made to alignment of CAPSTONE USAR JAG detachments, and concrete plans for their deployment in the Republic of Korea have been articulated for the first time. JAG detachments are scheduled to train with the Office of the Staff Judge Advocate, Headquarters, UNC/USFK/EUSA during the annual Team Spirit and Ulchi Focus Lens exercise. . . .

3. Contractor Debarments

Historically, there has been little competition in contracts awarded to Korean firms. Leaking government estimates and other confidential procurement information and collusion among bidders and offerors had been standard operating procedures for many years. To accomplish the mission under such circumstances, a controlled source selection procedure was established as a result of a 1976 DARCOM report concluding that "real" competition was rare in Korea. The Competition in Contracting Act (CICA), effective April 1, 1985, mandated "free and open competition" without exception for contracting environments such as that found in Korea. Under CICA, competition is now the rule in Korea; however, CID investigations indicated that collusion and leaks of government estimates were still prevalent. To take action against such nonresponsible contractors, the Office of the Staff Judge Advocate drafted debarment and suspension procedures that were approved by the Chief of Staff, USFK, effective March 5, 1986, as USFK Regulation 715-1, Debarment and Suspension Program. In 1986 two firms were debarred for one year each.²⁶⁶

Approximately thirty-one companies and eighty-six individuals were debarred during 1987. Grounds for debarment have included false cost and pricing data, collusion, improperly obtaining and using independent government cost estimates, bribing government officials, and false claims.²⁶⁷

4. Claims

During exercise Team Spirit 1986 the U.S. Armed Forces Claims Service, Korea, developed and implemented an automated system to track maneuver damages that provided the Commander in Chief, Pacific, an accurate daily status report. The system allowed the elimination of ponderous Korean notification forms and U.S. certificates of involvement, which the Koreans have estimated decreased the

²⁶⁶Memorandum, JAJ-AL. 14 Apr. 1988, subject: Judge Advocate General's Corps History Update at 2 [hereinafter 1988 Eighth Army Memorandum].

²⁶⁶1986 Eighth Army Memorandum, *supra* note 263, at 4.

²⁶⁷*Id.*

average processing time by two months. It provided better control to the commander, dollar savings, and significantly shorter processing times for the claimants.²⁶⁸

The U.S. Armed Forces Claims Service, Korea, was extremely active in all fields of claims operations. Computer equipment was ordered to automate the entire Claims Service, and a claims information management system was implemented at U.S. Army Claims Service direction. During fiscal year 1987 the Claims Service expended the most funds ever for payment of claims in Korea, a total of \$3,851,909.75. The Claims Service conducted field operations during Team Spirit 1987, receiving 1,584 allegations of damage, of which 1,075 were certified to the Korean Government as having been caused by the United States.²⁶⁹

5. *Foreign Criminal Jurisdiction*

Active liaison with the Republic of Korea Ministry of Justice and local prosecutors has resulted in release of jurisdiction to United States authorities of over ninety-nine per cent of the cases in which the United States and Korea had concurrent jurisdiction. Most criminal cases tried by Korean authorities involve U.S. civilian defendants, not subject to prosecution under the Uniform Code of Military Justice.²⁷⁰

6. *Combined Field Army*

As of October 1, 1986, the position of Staff Judge Advocate was upgraded from lieutenant colonel to colonel, and the deputy position was upgraded to lieutenant colonel. These upgrades recognize the facts that the Commander is a lieutenant general and that approximately forty-two per cent of all Army personnel assigned to units in the Republic of Korea are attached to the Combined Field Army for UCMJ jurisdiction. There are twelve special court-martial convening authorities in the Seoul area, all of which are under the general court-martial jurisdiction of Commander, Combined Field Army. Legal advice to these commands and trial counsel are provided by Legal Services Activity-Korea, located at Yongsan, but under operational control of Staff Judge Advocate, Combined Field Army. Legal assistance services and general administrative law support are provided by the Command Judge Advocate, 501st Support Group, also at Yongsan and under the supervision of the Staff Judge Advocate, Combined Field Army.²⁷¹

²⁶⁸*Id.* at 5.

²⁶⁹1988 Eighth Army Memorandum, *supra* note 265, at 5.

²⁷⁰1986 Eighth Army Memorandum, *supra* note 263, at 5.

²⁷¹*Id.* at 6.

The Combined Field Army Staff Judge Advocate office at Camp Red Cloud burned in February 1988 as a result of a furnace fire. The SJA office relocated to the Combat Service Support bunker, and expected to move back into the rebuilt SJA office in the early summer of 1988.²⁷²

7. *Yongsan Law Center*

Planning and coordination began in late 1986 to reorganize installation legal services in the Yongsan area, to enhance efficiency as well as the quality of services rendered. Two separate legal offices, Legal Services Activity-Korea (LSAK), and Command Judge Advocate (CJA), 501st Support Group, were providing installation legal services to the same clients, the first providing trial counsel and military justice advice and the second providing legal assistance and administrative law opinions. Consolidation of these two offices gained momentum during the reorganization of the Yongsan Garrison in 1987. When Commander, Eighth Army Special Troops (EAST), assumed command of Yongsan Garrison in December 1987, the first steps were taken to consolidate the resources of the Command Judge Advocate office and Legal Services Activity-Korea. Space planning for a merged office in the garrison headquarters was accomplished in early 1988, and the two offices will form one large installation legal office known as the Yongsan Law Center when the garrison headquarters renovation is complete in August 1988. The Yongsan Law Center will be a branch of the Office of the Staff Judge Advocate, Combined Field Army (ROK/US), and will be one of the largest SJA branch offices in the Army. Efficiency and services to clients should be significantly enhanced by this reorganization.²⁷³

8. *Operational Law*

During 1987 the Operational Law Division of The Judge Advocate's Office reviewed numerous OPLAN's and CONPLAN's at the Combined and Theater Army level. Focal point of these reviews were rules of engagement and treatment of civilians. Judge Advocate participation in exercises increased dramatically during 1987 as the command increased the number of exercise legal events. During Exercise Focus Clear judge advocates from all divisions of the office participated and were deeply involved in providing advice on Rules of Engagement, legal implications of establishing a Sea Defense Zone, and insuring proper reporting of war crimes.²⁷⁴

²⁷²1988 Eighth Army Memorandum, *supra* note 265. at 2.

²⁷³*Id.* at 2-3.

²⁷⁴*Id.* at 3.

9. Labor Issues

A wave of labor unrest swept the Republic of Korea during the summer and fall of 1987, affecting USFK when a dockworkers' strike at the port facility in Pusan caused delays in the delivery of supplies to U.S. facilities throughout Korea. In October a baggage handlers' strike at Kimpo Airport caused a delay in APO mail service. Neither the dockworkers nor the baggage handlers, however, were employees of USFK or a USFK contractor. Additionally, contract guards at Camp Humphreys and Camp Casey went on strike. Korean Area Exchange cab drivers, also contractor employees, at Camp Humphreys and Yongsan went on strike during October. In each instance the workers sought higher wages. Although these strikes caused inconvenience, they were nonviolent and received little publicity. With the exception of the one-day stoppage at Waegan involving a small number of Korean employees dissatisfied with the treatment of their second-line supervisor, there were no disruptions of USFK activities on the part of the Korean Employees Union (KEU). In each of the incidents described above, the Office of the Judge Advocate advised commanders and managers as to legal considerations and ramifications.²⁷⁵

10. Olympic Support

In April 1987 the Judge Advocate began assisting J-5 as the organization responsible for coordinating USFK support for the Seoul Olympic Organizing Committee (SLOOC). Support consisted of attending monthly meetings and providing legal opinions on all requests for support from the SLOOC. During August 1987 support was expanded by providing legal opinions on requests for support from the United States Olympic Committee (USOC). As the Olympics drew closer more time was devoted to Olympic issues.²⁷⁶

11. Automation

Legal services activities throughout USFK came on-line with state-of-the-art automation and communication systems in 1987. Current and projected automation systems provide the Defense Data Network instantaneous transmission of vital information, expand the legal research capabilities, make it possible to send or receive facsimile copies of documents, and allow manipulation of management and information control data. In coordination with the local information management offices and the Information Management

²⁷⁵*Id.* at 4.

²⁷⁶*Id.*

Officer for The Judge Advocate General's Office, legal services in Korea have progressed from the era of the stubby pencil to the computer age. All SJA offices have automated communications with access to automated legal research and facsimile transmission and reception capability. Judge advocates can instantaneously transfer files and documents to and from most locations in Korea, as well as to and from CONUS. Many legal actions that formerly required several days of telephone calls can now be managed through automation systems. In addition, automated legal research is available through the WESTLAW system, which provides access to virtually all case law, statutes, and other legal reference materials in American jurisprudence.²⁷⁷

XV. CONCLUSION

Time and space limitations have prohibited inclusion of all events of significance in the JAG Corps since 1982. An effort was made to include the events that had the greatest significance to the Corps at-large.

This chapter of the JAG Corps history has reached its conclusion, but the history of the Corps continues on. It is beneficial to pause and reflect on past accomplishments, but we must also look forward to future challenges. The role of the JAG officer will continue to change and challenge each of us to accomplish the goal of providing the best possible legal service to the Army Community.

²⁷⁷*Id.* at 5

THE NATO STATIONING AGREEMENTS IN THE FEDERAL REPUBLIC OF GERMANY: OLD LAW AND NEW POLITICS

by Major Mark D. Welton*

I. INTRODUCTION

The North Atlantic Treaty Organization (NATO) stationing agreements¹ have passed their twenty-fifth anniversary in the Federal Republic of Germany.² The focus of attention within the Federal Republic over the status and activities of the sending states' forces³ under these agreements has broadened from almost exclusive concentration on the issue of criminal jurisdiction over the members of the forces⁴ to other areas of concern involving the impact of NATO mili-

*Judge Advocate General's Corps, United States Army. Currently assigned as Senior Instructor, International Law Division, The Judge Advocate General's School. Formerly assigned as Legal Liaison Officer, U.S. Embassy, Bonn, Germany, 1985-1987; International Law Division, Office of The Judge Advocate, Headquarters, U.S. Army Europe and Seventh Army, 1983-1985; Department of Law, United States Military Academy, West Point, New York, 1979-1982; and Office of the Staff Judge Advocate, 5th Infantry Division (Mech), Fort Polk, Louisiana, 1977-1979. A.B., Stanford University, 1972; J.D., Georgetown University, 1975; M.B.A., Long Island University, 1982; M.A., Boston University, 1987; LL.M., University of Virginia, 1988. Member of the bars of Pennsylvania, the U.S. Supreme Court, and the U.S. Court of Military Appeals. Author of *Die Aufrechterhaltung von Ordnung und Sicherheit bei den US-Streitkräften in den Vereinigten Staaten und in der Bundesrepublik Deutschland*, 2 Neue Zeitschrift fuer Wehrrecht 66 (1985). This article is based on a paper submitted in partial fulfillment of degree requirements in the LL.M. program at the University of Virginia.

¹Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO Status of Forces Agreement]; Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with Respect to Foreign Forces stationed in the Federal Republic of Germany, with Protocol of Signature, August 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter Supplementary Agreement, and Protocol]. As indicated by their names, the NATO Status of Forces Agreement applies in the territory of each of the signatory states; the Supplementary Agreement applies only in the territory of the Federal Republic of Germany. Numerous other agreements have been concluded pursuant to specific articles of these two agreements; see *infra* note 72.

²Both agreements entered into force for the Federal Republic of Germany on July 1, 1963. Bundesgesetzblatt [BGBI] 1963 II S. 745.

³The sending states' forces consist of the armed forces of Belgium, Canada, France, the Netherlands, the United Kingdom, and the United States, which are stationed on the territory of the Federal Republic of Germany. Denmark withdrew its forces from the Federal Republic in April 1958.

⁴NATO Status of Forces Agreement, art. VII; Supplementary Agreement, arts. 17-19. See generally S. Lazareff, Status of Military Forces under International Law (1971); R. Ellert, NATO 'Fair Trial' Safeguards (1963); G. Draper, Civilians and the NATO

tary activities on the German milieu. There are two readily discernible reasons for this development. The size and scope of NATO forces and activities⁵ are perceived to have an increasingly significant correlation to emerging problems concerning West Germany's physical environment, drawing greater public attention to these activities.⁶

Status of Forces Agreement (1966); R. Stanger, *Criminal Jurisdiction over Visiting Armed Forces*, in 52 U.S. Naval War College International Law Studies 1 (1965); Baldwin, *The International Law of the Armed Forces Abroad*, in 62 U.S. Naval War College International Law Studies 667 (R. Lillich & J. Moore ed. 1980); Hearn, *Status of Armed Forces Abroad*, *id.* at 676; Grabb, *The Status of Armed Forces Abroad*, *id.* at 683; *Jurisdiction over Members of the Armed Forces Serving on Foreign Territory*, 52 Am. Soc'y. Int'l. L. Proc. 174 (1958); E. Steinkamm, *Die Wehrstrafgerichtsbarkeit Im Grundgesetz Der Bundesrepublik Deutschland* 95-103 (1974).

⁵Although sources vary in their estimates, and the numbers have fluctuated moderately over time, it can be assumed that the sending states' forces currently consist of approximately 450,000 soldiers, an equal number of civilian employees and technical advisors, together with accompanying family members (a total of over one million persons). J. Goldern, *The Dynamics of Change in NATO* 126 (1983); Poettering, *Germany's and France's Interest in a European Security Policy*, 37 *Aussenpolitik* 176, 180 (1986); Central Office of Information, *Britain 1987*, at 91 (1987); Public Information Office [1 (Be) corps/bfg], 1st Belgian Army Corps 41 (1987) (it should also be noted that the sending states have taken the position, which appears to have been accepted by the German federal government, that under article 6 of the Supplementary Agreement members of the sending states' forces, the civilian component, and their dependents are not subject to the West German census). The sending states' forces occupy some 3900 accommodations and operate seven major training areas of about 73,000 hectares. *Stellungnahme der Bundesregierung zum Abschlußbericht des Unterausschusses "Truppenübungsplätze/militärische Flugplätze" des Verteidigungsausschusses des deutschen Bundestages vom 28. Februar 1985*, at 8 (Bonn, August 30, 1985) [hereinafter *Stellungnahme der Bundesregierung*]. In 1985, the West German armed forces (Bundeswehr) consisted of 495,000 soldiers, utilizing thirteen major training areas of about 77,000 hectares. Federal Ministry of Defense, *Weißbuch* 238 (1985); *Stellungnahme der Bundesregierung* 4. The Federal Republic of Germany has a (declining) population of about 61 million, occupying an area of slightly over 248,600 square kilometers (about the size of the state of Oregon). *Political Handbook of the World: 1987*, at 210 (A. Banks ed. 1987). This data supports the perception of West Germany as a small country with a relatively sizeable domestic and allied military presence, a point often mentioned in criticism of sending states' activities in the Federal Republic.

⁶The German press has devoted extensive coverage within recent years to such topics as the detrimental effects of low-flying military aircraft on rural communities (*e.g.*, *Der Spiegel*, Dec. 9, 1985, at 70; *Stern*, Oct 9, 1986, at 200; *Stern*, Oct. 10, 1985, at 20; *Stern*, June 27, 1985, at 1181; accidents involving military aircraft and vehicles carrying a variety of ammunition and weapons (*e.g.*, *Der Spiegel*, Sept. 9, 1985, at 76; *Der Spiegel*, April 19, 1985, at 118); damage and injury related to military maneuvers and exercises (*e.g.*, *Stern*, Oct. 16, 1986, at 292; *Der Spiegel*, April 15, 1985, at 34), and problems concerning storage of chemical and nuclear weapons (*e.g.*, *Stern*, Feb. 13, 1986, at 62; *Stern*, March 15, 1985, at 16; *Der Spiegel*, October 20, 1986, at 86). References to the stationing agreements are often cursory and incomplete; for instance, in an article about the "land hunger" of the U.S. Forces, *Der Spiegel* asserted that the U.S. Forces can acquire additional land through the federal German authorities whenever it desires, even against the will of local communities. *Der Spiegel*, March 4, 1985, at 63. This assertion oversimplifies the procedures which the sending states' forces must follow, and it minimizes the extent to which the federal government must respond politically and legally to the interests and opinions of local communities.

Additionally, strategic decisions by NATO in the late 1970's⁷ resulted in a program of equipment, facilities, and weapons modernization by the sending states' forces,⁸ which not only heightened awareness of the environmental, economic, and social impact of those forces' programs on local communities, but also contributed to the national debate about NATO (and West German) military strategy, policies, and commitments.⁹ As a factor in these political and military develop-

⁷The strategic decisions concerning the stationing of new medium-range weapons systems in the Federal Republic of Germany and other NATO countries in Europe, and the concomitant review of the alliance's military and political policies, have been widely discussed. See generally W. Feld & J. Wildgen, NATO and the Atlantic Defense (1982); L. Martin, NATO and the Defense of the West (1985); Aaron, *Neubewertung der atlantischen Allianz*, 16 Europa-Archiv 481 (1986); Dean, *Will NATO Survive Ballistic Missile Defense*, 39 Journal of International Affairs 95 (1985); de Santis, *An Anti-Tactical Missile Defence for Europe*, 6 SAIS Review 99 (1986); Etzold, *The End of the Beginning . . . NATO's Adoption of Nuclear Strategy*, 22 The Atlantic Community Quarterly 321 (1984-85); Haftendorn, *Lastenteilung im atlantischen Bündnis. Die Zukunft der amerikanischen militärischen Präsenz in Europa*, 16 Europa-Archiv 497 (1985); Hoffmann, *Europe and the Missile Defense Problem*, 36 Aussenpolitik 136 (1985); Sorenson, *Ballistic Missile Defence for Europe*, 5 Comparative Strategy 159 (1985); Wilson, *A Missile Defence for NATO: We Must Respond to the Challenge*, 1986 Strategic Review 9; Woerner, *A Missile Defence for NATO Europe*, 1986 Strategic Review 13. See *infra* concerning the decision of the German Constitutional Court on the legality of the NATO double-track decision and the stationing of new weapons systems in the Federal Republic.

⁸Along with the program for deployment of new nuclear weapons systems, the United States began to take steps in the late 1970's to modernize and expand the physical plant, including housing, and training areas of its military forces in the Federal Republic of Germany. To a lesser extent, a similar program was carried out by the British forces in the Federal Republic, particularly in relation to the introduction of new aircraft. See Central Office of Information, Britain 1985, at 93-95. These programs have contributed to concern about the detrimental effect of sending states' forces activities on the West German environment. See Apel, *The SPD Remains Firmly Committed to NATO*, 35 Aussenpolitik 140, 144 (1984) ("Apart from this, however, we also have to ask ourselves whether it is possible for the Federal Republic of Germany already to host additional divisions in peacetime, whether we have the necessary space and whether we can build the requisite barracks. In other words: we have to ask ourselves whether our country is today, with some 800,000 troops, not already bearing an unduly heavy burden.").

⁹ The cataclysms of two lost wars, the recognition of the lethality of modern weapons of mass destruction and the presence, manifest in permanent military activities, of some two million soldiers in both German states have led to a new perception of the armed forces by society. . . . The demonstrations by the German peace movement in 1983 find an explanation in the described change in security policy from that of the preceding decade of detente. . . . Another sign of criticism of the country's security policy are demonstrations and violence against military installations and maneuvers, that for the first time in the autumn of 1984 assumed considerable dimensions. . . . A final factor is that the political party of the GREENS, newly represented in the German Bundestag, is conducting a permanent political campaign against German and allied armed forces in the Federal Republic of Germany.

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ments and decisions, the activities of the sending states' forces have been the subject of renewed (and often critical) analysis within the Federal Republic of Germany.

Underlying this shift in attention to the broader implications of sending state forces' activities, as well as contributing to more visible manifestations of criticism and ambivalence towards the western alliance by some segments of German society, is a dominant trend in West Germany's historical development as a state that may be characterized as the gradual acquisition of full sovereignty by the Federal Republic. Both the NATO Status of Forces Agreement and the Supplementary Agreement, which grant the sending states' forces extensive rights and privileges on German territory, were negotiated during a period of limited German sovereignty in the 1950's. These agreements entered into force at the juncture between the authentic end of the occupation era and a new period of political independence and self-assertion. Their acceptability in a fully sovereign state, and their relevance to contemporary problems of West German society, are now being questioned more closely by German writers and challenged more frequently in various political and legal forums.

This article examines the development and current status of the

German Section on the Subject of the Xth International Congress of the International Society for Military Law and the Law of War, at Garmisch, October 15, 1985, at 2-3. See generally Poettering, *A New European Security Policy*, 36 *Aussenpolitik* 147, 148-149 (1985).

[T]he Peace Movement and sections of the SPD are calling for a "Europe for the Europeans" and a disavowal of security links with the USA which according to Alfred Mechttersheimer is no longer the guarantee of European security but in fact has become the reason for the threat to Western Europe from the USSR and as a result is the reason for the lack of security. . . . The aim according to the Greens' "peace manifesto" is to create a demilitarized, nuclear weapons-free and neutral Europe; which is not associated with either of the superpowers, nor seeks to become one itself.

Id. See also Asmus, *The SPD's Second Ostpolitik with Perspectives from the USA*, 38 *Aussenpolitik* 40, 40-41 (1987).

[S]ince it entered parliamentary opposition in the fall of 1982 the SPD has undergone a steady shift to the left on key security and foreign policy issues that amounts to a near-total rejection of the policies of the Schmidt era. At its Nuremberg party congress this past August the party adopted a security policy platform calling for the withdrawal of Pershing II and cruise missiles from West Germany, the cancellation of the US-West German SDI accord, cuts in conventional defense spending and a long-term restructuring of the West German Bundeswehr in terms of alternative defense. . . . The consensus on security policy that was such a hallmark of West German politics since the early 1960's has been irrevocably shattered.

Id.

stationing agreements within the specific historical and political context of the Federal Republic of Germany. The focus of the discussion is on the correlation between the evolution of West German sovereignty and the rights and obligations of the sending states' forces under the NATO Status of Forces Agreement and the Supplementary Agreement. A detailed study of all of the issues raised by the stationing agreements is not attempted;^{**} rather, the article seeks to provide a conceptual framework that can be applied generally to any issue which might arise concerning the interpretation and application of the stationing agreements in the Federal Republic.

To establish such a framework, the article first discusses the legal status of military forces stationed on the territory of a foreign state and the political development of the Federal Republic of Germany. The relationship between the rights of sending states' military forces and the sovereignty of the receiving state under traditional and emerging principles of international law is also reviewed. In the next part, this general analysis is applied to the specific relationship between West German sovereignty and the NATO treaty regime governing the status of visiting forces in the Federal Republic. Finally, the primary method of dispute resolution applied to issues arising

^{**}Issues arising under the stationing agreements which have most visibly created a perception of conflict between sending states' forces and German interests include the range of lawful measures by the sending states to protect the safety and security of the forces against terrorist acts, the impact of military activities on the physical environment, and threats to public safety from the transportation and movement of weapons and equipment over public roads. These issues, however, are clearly not exhaustive of the many types of activity governed by the stationing agreements which have given rise to varying degrees of controversy in recent years. Other such areas within the NATO Status of Forces Agreement include imposition of the death penalty by sending state military courts (art. VII(7)) and passport and visa control over members of the forces and civilians (art. III). Areas covered specifically by the Supplementary Agreement include, *inter alia*, service of civil process (art. 32); vehicle registration (art. 10); exemption from residence and alien control regulations (art. 6); maneuver and air exercises (arts. 45-46); procurement of goods and services, including tax and customs relief (arts. 65-68); postal and telecommunication services (arts. 59-60); banking and foreign exchange (arts. 69-70); employment of local labor (art. 56); and construction and maintenance of facilities (arts. 48-49). A complete analysis of these issues is beyond the scope of this article for reasons of length and, in some cases, the sensitivity and classification of some of the material precludes a complete review. Some of these issues are discussed, however, in parts III and IV, *infra*, to illustrate the application of this approach to interpreting the stationing agreements.

There are few recent studies in this area. For a brief but helpful overview of the stationing agreements, see Parkerson, *The Stationing Agreements and Their Impact at the Federal German Level: A Bonn Perspective*, *The Army Lawyer*, February 1986, at 8. For a recent background study of individual rights and privileges under the stationing agreements, see Gordon, *Individual Status and Individual Rights under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 *Mil. L. Rev.* 49 (1983).

under the stationing agreements, diplomatic negotiation, is viewed from the sending states' and from the German perspectives, to demonstrate the importance of considering the political and historical context in interpretation of the stationing agreements. Some conclusions about the future prospects for these agreements in the Federal Republic of Germany can then be made.

11. THE LEGAL STATUS OF VISITING FORCES: THE GENERAL CONTEXT

Before examining the specific legal regime established by the NATO Status of Forces Agreement and the Supplementary Agreement in the Federal Republic of Germany, it is useful to review the customary international law on the subject, as well as some commentary on that law, to understand the reasons for current reliance on treaty law in this area. The recent decision of the Federal Constitutional Court (Bundesverfassungsgericht) on a related issue, the stationing of intermediate-range nuclear weapons in the Federal Republic, is then considered. This approach will help illustrate the significant differences between the scope of activities carried out within the NATO alliance (including those under the NATO Status of Forces Agreement and the Supplementary Agreement) compared with activities of visiting forces in earlier periods, and the much greater impact of the former on the sovereignty of the receiving state.

The relationship between visiting forces and the receiving state traditionally was viewed exclusively as a problem of the immunity of a foreign state and its instrumentalities from the exercise of jurisdiction (based on the territorial principle) by civil and criminal courts of the receiving state." Inherent in this issue is a basic conflict between

"See generally W. Bishop, Jr., *International Law* 658 (3rd ed. 1971); R. Wallace, *International Law* 108-109 (1986). German courts follow the restrictive theory of sovereign immunity, distinguishing between the public acts (*jure imperii*) and the private (including commercial) acts (*jure gestionis*) of states, and looking to the "nature of the act" as a guide to making this distinction. Seidl-Hohenveldern, *State Immunity: Federal Republic of Germany*, 10 *Netherlands Yearbook of International Law* 55 (1979); *Claim Against the Empire of Iran*, 16 *Bundesverfassungsgericht (BVerfG)* 27 (1963). Sovereign immunity is applied to the activities of foreign military forces as public acts ("Kernbereich der Staatsgewalt"). A. Verdross and B. Simma, *Universelles Völkerrecht* 768-69. However, Brownlie notes the existence of both privileges as well as immunities involved in the stationing of sending states' forces abroad, though he concludes that

it is believed that the special rights involved in the stationing of armed forces on foreign territory, and other instances of the exercise of governmental functions on the territory of another state, are relatively less normal and more prominently "privileges" than the other cases of official intercourse including the sending and receiving of diplomatic agents.

two sovereign interests: the sending state's control, particularly through the exercise of jurisdiction, over its official instrumentalities (here, military forces), and the receiving state's control over activities occurring within its territory. In an international system based upon the sovereign equality of states," the dilemma arises of deciding which sovereign interest will prevail over the other.

A classic analysis of this dilemma, which incorporates much of the customary international law, is contained in *The Schooner Exchange v. M'Faddon*.¹³ In evaluating these two sovereign interests, Chief Justice Marshall used language which takes note of the legal (consensual) as well as the political (power) aspects of sovereignty:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction. . . . [A]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. . . . This consent may be either express or implied.¹⁴

I. Brownlie, *Principles of Public International Law* 364 (3d ed. 1976). This distinction is significant, because actions by sending states' forces based on privileges are arguably more susceptible to control and regulation by the receiving state than are actions which are covered by state immunity.

"According to Chief Justice Marshall, the international system was "composed of distinct sovereignties, possessing equal rights and equal independence," resulting in the "perfect equality and absolute independence of sovereigns." *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136-137 (1812). See also R. Wallace, *supra* note 11, at 108 ("[I]n *parem non habet imperium*' — one cannot exercise authority over an equal. All states are equal. No state may exercise jurisdiction over another state without its consent.").

¹³11 U.S. (7 Cranch) 116 (1812). The case involved an attempt by Americans, claiming to be the former owners of a U.S. ship seized by French military forces on the high seas and commandeered into the French navy, to have the U.S. courts restore the ship to them when it was forced into the port of Philadelphia for repairs. Although the case therefore involved the passage of a foreign military vessel through U.S. territory, the decision is often cited to apply more broadly to the status of foreign military forces in transit or even stationed on the territory of another state. See Brownlie, *supra* note 11, at 368. This derives from Chief Justice Marshall's language that

this perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, . . . have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation. . . . 3d. A third case . . . is, where he allows the troops of a foreign prince to pass through his dominions.

11 U.S. (7 Cranch) at 137-139.

¹⁴11 U.S. (7 Cranch) at 136.

Because a military vessel is an object which represents the sovereignty of the state to which she belongs,¹⁵ any interference with that vessel directly affects the sovereign interests of the state. Therefore, the conflict between the two sovereign rights can be resolved only by finding, in this case, an implied consent by the territorial state to an infringement on its sovereignty by the visiting state. Chief Justice Marshall recognized the political aspect of sovereignty when he noted that, "without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals."¹⁶ But in the absence of a clear assertion of this power, the sovereign interests of the territorial state must under customary international law yield to those of the sending state.

The assumptions that underlie Chief Justice Marshall's approach to this problem may not be fully valid in an international system with different characteristics. The first problem lies in the assumption that the two states involved in this case are equal in the legal and political senses, i.e., that the territorial sovereign has the legal status to consent to the introduction of foreign forces into its territory, and sufficient power to use force or any other means to oppose those forces or subject them to its jurisdiction if it so chooses. As discussed below,¹⁷ this assumption does not necessarily fit the case of the introduction of NATO sending states' forces into the Federal Republic of

¹⁵ When private individuals of one nation spread themselves through another as business or caprice may direct, . . . it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. . . . But in all respects different is the situation of the public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state.

Id. at 144. The distinction drawn by Chief Justice Marshall in this statement has been carried over into the NATO Status of Forces Agreement's differentiation between official and nonofficial acts by members of the visiting forces, which can determine which state may exercise criminal jurisdiction [art. VII (3)] or the extent of liability for damages arising from claims against the sending state by the receiving state or its nationals (art. VIII).

¹⁶*Id.* at 146.

¹⁷*See infra* Part III (A). The United Nations General Assembly Resolution 2625, October 24, 1970, 9 Intl. Legal Materials 1292 (November 1970) on the sovereign equality of states, offers little guidance on the meaning of sovereignty; it perpetuates Chief Justice Marshall's assumption of the sovereign equality of states without discussing the problem of the political inequality of states within the present international system.

Germany. The second assumption is that the exercise of jurisdiction by the receiving state's courts is the particular sovereign interest affected by the presence of sending states' forces. However, a review of the provisions of the Supplementary Agreement" reveals the broad range of state interests which may be affected by sending states' forces' activities under the stationing agreements. As noted in the introduction, it is predominantly these areas, apart from the exercise of criminal and civil court jurisdiction over members of the forces, that have given rise to current controversy. In this regard, finally, the assumption was made that it is the action (here, the exercise of jurisdiction) of the receiving state which must yield to the superior sovereign interest of the sending state. This may be warranted if, as in *The Schooner Exchange*, the situation involves simply the passage through or temporary delay of foreign forces in the territory of the receiving state, with little if any infringement on the legal or political interests of that state. Those interests may be affected to a much greater extent by activities of foreign forces that are permanently stationed on the territory of the receiving state, a situation that may require reconsideration of which sovereign interest must yield to the other.¹⁹

Commentary on this case reflects the problem of transferring the legal and political assumptions explicated in *The Schooner Exchange* to the current international system. Brownlie finds that, while some writers view the case as supporting the principle of "the law of the flag," or absolute immunity for the visiting forces, others have relied on subsequent cases and practice to assert only a qualified immunity from criminal jurisdiction in certain circumstances for those forces.²⁰ His own conclusion is that the Court's "rationale for the immunity was the implied waiver by the receiving state of the exercise of any powers which would seriously affect the integrity and efficiency of the force."²¹ As a result, the visiting forces should be entitled to immunity in some areas (local taxes, for instance) but not in others (civil actions for harm to local citizens), depending upon the nature of the territorial sovereign's interest and that of the force involved. He

¹⁸Cf. *supra* note 10.

¹⁹See Sennekamp, *Die volkerrechtliche Stellung der ausländischen Streitkräfte in der Bundesrepublik Deutschland*, 48 *Neue Juristische Wochenschrift* (NJW) 2731, 2732 (1983), in which the author stresses the numerous areas of potential conflict between the sending states' forces, which seek to retain a status as close as possible to that which they enjoy at home, and the receiving state, which seeks to minimize intrusions into its sovereignty.

²⁰I. Brownlie, *supra* note 11, at 368-371. See also Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 *Colum. L. Rev.* 1091 (1953).

²¹I. Brownlie, *supra* note 11, at 369.

nevertheless recognizes that this rationale does not result in clear choices of which interest will prevail in every case. Noting that subsequent cases and practice have led to confusion, he suggests that reliance on treaties provides a more reliable basis for setting priorities among the conflicting sovereign interests.²²

Lazareff, who calls the status of allied forces in foreign territory in the absence of an agreement “one of the most controversial issues in international law,”²³ distinguishes American tendencies, which support the “law of the flag” (absolute immunity) principle asserted in *The Schooner Exchange*, from British views, which favor adjusted territorial sovereignty, or the division of jurisdiction between the sending and receiving states. He supports the British position by restricting the application of the reasoning in *The Schooner Exchange* to its particular facts. First, the case involved the assertion of jurisdiction over a naval vessel, not over individual members of the crew, with the former more clearly representing the state as a sovereign entity, and so more clearly entitled to sovereign immunity. Second, the case involved the passage of a vessel (or forces) through a territory, which involves a lesser degree of territorial state interest than the permanent stationing of forces on the territory.²⁴ A distinction should thus be made on the basis that the absolute immunity from criminal jurisdiction over members of the sending states’ forces passing through the territorial state in limited numbers, with limited contact with the local population, would in practice be limited to disciplinary matters internal to the force, and therefore have little direct impact upon the interests of the receiving state. Lazareff thus concludes that there is little in *The Schooner Exchange* to support the absolute immunity of foreign forces which are permanently stationed in significant numbers on the receiving state’s territory.

On the other hand, he maintains that the exercise of full territorial sovereignty (jurisdiction) by the receiving state is incompatible with the *official* nature of military forces as representatives of the sending state. “Therefore, the territorial sovereign must take into consideration the representation of the foreign State by its agents, and must

²²*Id.* at 370. Brownlie’s balanced approach is reflected in the formula for determining criminal jurisdiction under the NATO Status of Forces Agreement. See *infra* note 51. Brownlie states that, according to Professor Baxter, this formula may pass into customary international law. *Id.* at 371.

²³S. Lazareff, *supra* note 4, at 11.

²⁴*Id.* at 12-17. It should be noted that during the eighteenth and nineteenth centuries, British forces were commonly stationed on foreign territory, while this was not the case for American forces. British experience in this area was therefore much more extensive than the American experience, and this would support adoption of the British view as more in accord with legal and political reality.

'liberalize' the application of the theory of territorial sovereignty."²⁵ This, he maintains, represents the customary international law on the subject as it has developed in practice. Like Brownlie, he concludes that the best method of resolving conflict over sovereign interests in this area is through international agreements.

Doubts about the continuing validity of the assumptions underlying the decision in *The Schooner Exchange v. M'Faddon* in the contemporary international system have thus led to general recognition that the problem is too complex to remain subject to regulation by principles of customary international law, and therefore treaty regimes are required. Not unexpectedly, German commentators seem to agree with this view. Even more strongly than Brownlie and Lazareff, Kimminich asserts that the right of foreign military forces to transit or remain on foreign territory can be granted and regulated only by treaty.²⁶ Similarly, Sennekamp finds that the original concept of foreign forces as "extraterritorial," and thus completely outside the legal system of the receiving state, is no longer valid, and the various relations and mutual interests of the interested states under current international law must be regulated by treaties."

Nevertheless, even under a treaty regime, the fundamental problem of conflicting sovereign interests in this situation does not necessarily disappear. This was made evident in the course of France's withdrawal in the mid-1960's from the military structure of NATO and the concomitant removal of NATO sending states' forces (which were subject to the NATO Status of Forces Agreement) and headquarters from French territory." In announcing French intentions, President de Gaulle wrote to President Johnson:

[H]owever, France considers that the changes that have occurred, or are in the process of occurring, since 1949, in Europe, Asia, and elsewhere, as well as the evolution of her own situation and her own forces, no longer justify, in so far as she is concerned, the arrangements of a military nature

²⁵*Id.* at 18.

²⁶O. Kimminich, *Einführung in das Völkerrecht* 160-161 (1983).

²⁷Sennekamp, *supra* note 19, at 2732-33.

²⁸Despite France's withdrawal from the military structure of NATO and the expulsion of NATO headquarters from France, French forces remain stationed in the Federal Republic of Germany under the NATO stationing agreements. Agreement on Stationing of French Forces in Germany, Exchange of Notes at Bonn, December 21, 1966, 6 *Int'l. Legal Materials* 41 (1967). France continues to participate in the sending states' forums which deal with the stationing agreements. Also, the NATO Status of Forces Agreement continues to apply to the relatively few allied forces' members who are stationed in or traveling through France.

made after the conclusion of the Alliance, either jointly in the form of multilateral agreements, or by special agreements between the French Government and the American Government. That is why France intends to recover, in her own territory, the full exercise of her sovereignty, now impaired by the permanent presence of Allied military elements or by the habitual use being made of its air space, to terminate her participation in the 'integrated' commands, and no longer to place forces at the disposal of NATO.²⁹

There is a clear connection in this statement between concern for national sovereignty and the presence of sending states' forces. President Johnson's response, however, included the statement that "I do not consider that such participation and cooperation involves any impairment of our own sovereignty—or that of any of our allies. In my judgment it reflects the exercise of sovereignty according to the highest traditions of responsible self-interest."³⁰

It is evident that under the traditional American position of the "law of the flag" the situation indeed did not impair American sovereignty, since the United States has been primarily a sending state. This raises the question of American understanding for the perception as well as reality of intrusions on sovereign interests that the permanent presence of foreign forces might create, even in a less nationalistic milieu than DeGaulle's France. The contrasting viewpoints of the two leaders probably can be traced to the different positions of France and the United States in the post-war international system, a system in which sovereignty must be seen in a perspective quite different from that taken in *The Schooner Exchange v. M'Faddon*. The following excerpt from an analysis of the French decision summarizes this point:

"[S]overeignty" and its derivatives, "independence" and "equality," remain basic principles in international law, even though in reality their content has been significantly eroded by growing interdependence. . . . As a matter of fact, the emergence of the two super-Powers has created a situation of basic inequality, and their global confrontation has reduced the sovereignty and independence of the nation-states both East and West of the Iron Curtain. The North

²⁹1 Whiteman, *Digest of International Law* 862-863 (1963).

³⁰*Id.* at 863. For a more complete discussion of the difference between French and American attitudes towards NATO, leading up to France's withdrawal from the military structure of the organization, see H. Kissinger, *The Troubled Partnership* 31-64 (1965).

Atlantic Treaty and the integrated structure have institutionalized this situation, marked by the position of the United States as the "core unit" or "leader state." . . . General de Gaulle has never accepted this state of affairs and, in criticizing the integrated structure, he and his government have used "sovereignty" as the crucial operative principle in their declaratory policy. France and, for that matter, any "sovereign" and "independent" state has the duty to provide for its own national defense, and the stationing of foreign troops in France under the integrated commands . . . was an intolerable infringement upon French sovereignty, even though based on international agreements or decisions to which France was a party. Apparently it matters little that modern doctrine and practice have abandoned the concept of an "indivisible" sovereignty which a nation state could not restrict by an international agreement without impairing its sovereign character.³¹

De Gaulle's actions reflect the dual legal-political nature of sovereignty. The act of withdrawal from NATO emphasizes the requirement for consent as a prerequisite to the legal imposition of any external restrictions on the exercise of state authority, and demonstrates that France possessed sufficient power to reverse its prior consent to those restraints. In this case, sovereignty reveals itself as a concept that is relevant to the contemporary international system, but one which must be understood in both its legal and its political ramifications. Moreover, it is also evident that sovereignty must be viewed in the specific national and political context to which the concept is applied; in so doing, it becomes apparent that the Federal Republic of Germany, which, like France earlier, is primarily a receiving state,³² is not in the same legal or political position as France. The recent decision of the Federal Constitutional Court on the stationing of intermediate-range nuclear weapons in the Federal Republic of Germany illustrates this point.

Following the decision by NATO to station intermediate-range

³¹Stein & Carreau, *Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization*, 62 Am. J. Int'l. L. 577, 602-603 (1968). For additional material on the French withdrawal from NATO, see Pickles, *France: Tradition and Change*, in *The Foreign Policies of the Powers* 215-222 (F. Northedge ed. 1974).

³²Some West German military forces are stationed, usually for periods of six months to a year, in Texas and Alberta where they undergo (principally) flight training. Smaller numbers are also stationed in other NATO countries. See Federal Ministry of Defense, *Weißbuch* 333-334 (1985).

Pershing II and cruise missiles in a number of European NATO countries in 1979,³³ the Green Party filed suit in the Federal Constitutional Court, alleging that the decision to allow the stationing of missiles on the territory of the Federal Republic violated the Basic Law (Grundgesetz).³⁴ The provision of that law of particular concern here is article 24(1), which states that the Federal Republic can by law transfer sovereign rights within the context of international arrangements. In the course of its decision,³⁵ the court held that this provision authorized the declaration of consent by the federal government to the stationing of the new weapons on West German territory, as part of the government's commitments to the NATO alliance, without requiring a separate international agreement subject to ratification by the Bundestag.

The decision makes clear that, for the Federal Republic, the concept of sovereignty remains legally important. Furthermore, in contrast to the French view, sovereignty can be legally relinquished to another state, though this can be done only within the framework of international agreement.³⁶ The court, however, was also careful to refer to the political aspects of the diminution of sovereignty authorized by article 24(1); the Basic Law grants the legal authorization for this action by giving "consent" in advance to a limitation on

³³See *supra* note 7 for citations to material concerning this decision.

³⁴See *infra* note 44 on the Basic Law. The Green Party alleged specifically that the federal government had infringed the rights of the Bundestag by reaching this decision without first seeking and obtaining approval from the Bundestag, in violation of several provisions of the Basic Law (*e.g.*, article 59(2)) concerning the treaty-making competence of the federal government and the distribution of powers within that government.

³⁵BVerfG, Decision of December 18, 1984, 11 NJW 603 (1985). This decision was preceded by a previous case before the same court, in which it was alleged that the stationing of new intermediate-range missiles in the Federal Republic raised serious health risks for the population as a result of the increased danger of nuclear war by accident or through a preemptive missile attack by the Soviet Union. The court held in a short opinion that the applicant did not establish a sufficient nexus between this danger, which depended upon actions by the Soviet Union, and the exercise of sovereign powers by the German federal government. It furthermore stated that the agreement did not violate any customary norms of international law. BVerfG, Decision of December 16, 1983, 45 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 119 (1985).

³⁶The decision contains numerous references to sovereignty ("Souveranität," "Hoheitsgewalt," "Hoheitsrechte") in its discussion of Article 24(1) of the Basic Law. In a passage of particular concern here, the court considers the "customary" rights of foreign forces in another state's territory within the context of a military alliance, and asserts that the "transfer" of sovereignty required by the exercise of these rights is necessary for the military security of the Federal Republic, and therefore actually protects the Federal Republic's sovereignty ("Souveranität"). BVerfG, Decision of December 18, 1984, 11 NJW 603, 607 (1985).

sovereignty; the decision on the extent of such limitations then becomes a political one for the federal government, without requiring a further legal authorization by the **Bundestag**.³⁷ Thus, the historical background to the NATO Treaty, Germany's integration into NATO, and the special agreements concerning the stationing of foreign (later allied) military forces in the Federal Republic are essential to understanding the relationship of German sovereignty to the rights of the NATO partners (specifically in this case, the United States).³⁸ This

³⁷The court noted that the United States can exercise its control over the weapons within the Federal Republic only in its capacity as a member of the alliance; the court also recognized, however, the peculiar status of the United States as the militarily most powerful member of the alliance, a political fact which the federal government is entitled to (and in fact must) consider. *Id.*, 607. The court found that this decision did not exceed the parameters established by the Basic Law for such decisions. The provisions of Article 24 of the Basic Law, which expressly contemplate limitations on German sovereignty through international arrangements and security alliances, are of course binding on the court. However, as noted in part III, *infra*, the scope of German sovereignty has changed since promulgation of the Basic Law in 1949, and actions which may be permissible under the Basic Law may be politically difficult, just as rights and privileges under the stationing agreements may be politically troublesome twenty-five years after their enactment in the Federal Republic.

³⁸The tension between the need to relinquish sovereign rights (within the framework of the NATO alliance) and the desire of the Federal Republic to retain sovereignty (demonstrated by the example of France) to the maximum extent possible is apparent in the "out of area" problem of the alliance. In response to a parliamentary inquiry on the use of U.S. airbases in the Federal Republic for missions to the Near East, the federal government responded that any such measures must receive the express approval of the federal government, in order to preserve the (sovereign) interests of the Federal Republic. Raub & Malanczuk, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1979*, 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 234 (1985). One German commentator has elaborated on the importance of national sovereignty in this context, with specific reference to the potential use of NATO bases in the Federal Republic by the United States for actions to combat terrorism outside the NATO area, as follows:

[T]hese bases are of course used for NATO defence missions. But this does not mean that national sovereign rights are given up. . . . The Federal Government, represented by the Minister of Foreign Affairs, has so far always answered questions concerning the use of bases of allied forces in the Federal Republic of Germany as follows: "There is agreement between the partners of the Alliance that all measures taken in the territory of the Federal Republic of Germany, i.e., also in bases of allied forces stationed there, and directed against areas outside the NATO area, are subject to the express approval of the Federal Government. In taking decisions on such requests, the Federal Government takes into account national and especially Alliance interests. Without the agreement of the Federal Government, allied forces may start actions from their bases in federal territory only if such actions serve the joint defence against an attack on the territory of one of the NATO partners in Europe or North America or on ships or aircraft of one of the partners in the North Atlantic area north of the Tropic of Cancer."

Speech by Mr. Horst Kraatz, German Ministry of Defence, to the U.S. Army, Europe International Law Conference (May 13, 1987).

relationship is clearly quite different for the Federal Republic than for states in the nineteenth century international system, or for France in this century. Consideration of this background is therefore essential in any current analysis of the NATO Status of Forces and the Supplementary Agreements.³⁹

111. THE STATUS OF VISITING FORCES IN THE FEDERAL REPUBLIC OF GERMANY: THE SPECIFIC CONTEXT

A. OCCUPATION AND THE ABSENCE OF SOVEREIGNTY

The defeat and subsequent occupation of Germany by the allied powers terminated the government of the Third Reich and divided Germany politically and administratively into four parts, with Berlin as an additional, separate entity similarly divided.⁴⁰ While the allied powers assumed full governmental powers within Germany following surrender⁴¹ and during the occupation,⁴² there nevertheless has been considerable debate about whether the state of Germany as a sovereign entity had also ceased to exist.⁴³ Regardless of the strictly

³⁹The decision considers the power of the federal government to enter into an agreement which, in effect, transfers sovereignty to another state within the alliance. It illustrates the importance of the concept of sovereignty in current German legal thinking, and demonstrates the importance of context in applying that concept to a particular issue. This case should be distinguished, however, from the transfer of sovereignty under the NATO Status of Forces Agreement and the Supplementary Agreement which, as described in the next part of this analysis, occurred under historical and political conditions of limited sovereignty in the Federal Republic, which no longer apply to that state.

⁴⁰Protocol Concerning the Occupation Zones in Germany and the Administration of Great Berlin, with Protocol, September 19, 1944, 227 U.N.T.S. 11, 279-309.

⁴¹Document of Surrender of the German Armed Forces, Berlin, May 8, 1945. *Rechtstellung Deutschland*, 4-5 (D. Rauschnig ed. 1985).

⁴²Declaration of June 5, 1945, Regarding the Defeat of Germany and the Assumption of Supreme Authority with Regard to Germany, 68 U.N.T.S. 190-211.

⁴³The debate has been summarized as consisting of two views. The first is "the *tertium non datur* argument under which Germany though conquered but not subjugated does not cease to exist as a state; not being annexed, her legal status is simply that of belligerent occupation under the Hague Rules." The second is

Kelsen's *debellatio*-condominium-sovereignty thesis under which the abolition of the German Government in consequence of *debellatio*—complete defeat—extinguished the state and without annexation or subjugation, unconditional surrender terms vesting supreme authority in the victors placed the sovereignty of German territory under the joined sovereignty of the occupant powers thus establishing a condominium.

¹Whiteman, *supra* note 29, at 330. One court stated that "admittedly, sovereignty is not a term with a very precise connotation; nevertheless, it is quite clear that the

legal arguments which could be made, it is clear that at the conclusion of the war, Germany lacked any power to reject the full range of externally imposed restraints on its decisions and actions, which is the political requisite for sovereignty. Therefore, while the state of Germany may have continued in existence, it is evident that on May 8, 1945, Germany was no longer sovereign.

The history of the Federal Republic of Germany from its creation in 1949⁴⁴ until the conclusion of the Inter-German Treaty (Grundvertrag) of 1972 may be summarized as an effort by the new state to acquire sovereignty.⁴⁵ While the course chosen to achieve this was not unopposed,⁴⁶ Adenauer's policy of sovereignty through integra-

powers assumed by the Allies fall something short of what is generally understood by sovereignty." *Rex v. Bottrill, ex parte Kuechenmeister*, (1946) 1 All E.R. 635 (K.B.). Brownlie asserts that the occupation of Germany was neither a belligerent occupation nor a *debellatio* leading to Germany's extinction as a state. I. Brownlie, *supra* note 11, at 77. See also Bishop, *supra* note 11, at 326-329. Bleckmann concludes that the relationship between the occupation authorities and Germany was unique and not governed by international law. A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* 52 (1982).

⁴⁴Following the capitulation of the Third Reich in June 1945, political parties were permitted to organize in all of the occupation zones by the end of 1945. New boundaries for the federal states (Länder) were drawn up in 1946, with Minister-Presidents appointed by the allied powers. After failing to agree with the Soviet Union in December 1947, in London about the future status of Germany, the governors of the three western zones submitted documents to the Lander Minister-Presidents on July 1, 1948, in Frankfurt, recommending immediate establishment of a council to draft a constitution for the western zones. The Basic Law (Grundgesetz), a temporary "constitution" pending reunification of Germany, was approved on May 8, 1949, with the military governors giving final approval (subject to numerous conditions concerning the exercise of powers granted to the German federal government) to the Bundestag on May 12. The first federal election was held on August 14, 1949, with the Christian Democratic Union (CDU) winning a slight parliamentary majority. Konrad Adenauer consequently became the first West German chancellor, a position he held until October 1963. See U. Harbecke, *Abenteuer Deutschland* 36-46 (1983); German Bundestag Press and Information Center, *Questions on German History* 352-383 (1984); Letter of Approval of the Military Governors of the British, French, and American Occupation Zones to the Basic Law, Frankfurt am Main, May 12, 1949, *Rechtstellung Deutschlands*, *supra* note 41, at 37-44.

⁴⁵Like the eventual reunification of Germany, this has been for most German leaders a long term goal, but for Adenauer, acquiring a greater degree of sovereignty had priority. Reacting to the critical question in 1949 concerning "neutralisation" of the Federal Republic, with the possibility of reunification, or alliance with the West and almost certain Soviet opposition to any form of reunification of the two German states, Adenauer's decision for the latter course was firm. Harbecke, *supra* note 44, at 49.

⁴⁶The Social Democratic Party (SPD), led by Kurt Schumacher, led the main opposition to the integrationist policies of the CDU under Adenauer. See Windsor, *West Germany in Divided Europe*, in *The Foreign Policies of the Powers* 242-244 ("[T]he fate of the Weimar Republic had shown what would happen if a democratic system of government were combined with the loss of national independence, or with a restrictive set of international commitments. So Schumacher embarked on a course of preventive nationalism."). The SPD labeled Adenauer the "Chancellor of the Allies." Nevertheless, it has been pointed out that the goals, if not the policies, of both political leaders were the same—full sovereignty for at least the western half of Germany. *Id.*, 246.

tion with the west was the consistent and dominant foreign policy of the new state during its first thirteen years of existence:

[F]or the Federal Republic, integration merely involved sacrificing nonexisting, potential rights in exchange for actual, partial sovereignty. Since integration was predicated on the equal subjection to common rule, self-abnegation became the condition for self-assertion. As such, Adenauer's tactics were exactly the reverse of the early Europeanists such as Jean Monnet, one of the founding fathers of European integration. They saw partial integration as an irresistibly spreading solvent of national sovereignty because each concrete integrative measure in any one area would force leaders to integrate more and more sectors. Adenauer, however, reversed the logic by using each concession to the FRG as a lever for lifting the restraints upon German statehood and freedom (i.e., upon German national sovereignty).⁴⁷

Viewed from the legal perspective on sovereignty, the Federal Republic could not truly consent to (and thus choose and limit) the external restraints imposed by the allied powers until the occupation regime was *de jure* and *de facto* terminated. From the political perspective, the power to terminate that regime was, in Adenauer's view, possible only by integrating the Federal Republic with the West, primarily in the political, military, and, to a lesser degree, the economic spheres.

The policy of regaining sovereignty thus consisted of a series of steps designed to link Germany with the states of western Europe and the members of the NATO alliance.⁴⁸ Among the founding mem-

⁴⁷Joffe, *The Foreign Policy of the Federal Republic of Germany*, in *Foreign Policy in World Politics* 72 (R. Macridis ed., 6th ed. 1985). See also Windsor, *supra* note 46, at 246.

West Germany had entered upon a process of partnership and integration with the Western world, and the main emphasis of foreign policy in the ensuing years would be on the development of this partnership "as a means" to securing greater freedom and a higher degree of sovereignty for the Federal Republic . . . and from that time on every relaxation of control, every concession to German sovereignty, went hand in hand with a fuller German commitment to the process of Western integration — until at last the whole process culminated in German rearmament exclusively within the framework of NATO and entirely according to NATO plans.

Id.

⁴⁸The North Atlantic Treaty of April 4, 1949, 68 Stat. 2241, T.I.A.S. 1964, 34 U.N.T.S.243, establishing the North Atlantic Treaty Organization, was signed by Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. Greece and Turkey acceded to the treaty in 1952. As noted below, the Federal Republic of Germany be-

bers of that alliance, the legal problems involved with the stationing of military forces in the territory of another state had been addressed in the NATO Status of Forces Agreement, which was signed on June 19, 1951.⁴⁹ As noted previously,⁵⁰ the issue of criminal jurisdiction over members of the sending states' forces was the predominant focus of attention by the treaty drafters.⁵¹ Of primary concern to this analysis, however, is the language of article II of the NATO Status of Forces Agreement:

[I]t is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.

The word *respect* is problematic;⁵² it implies less than full immunity from receiving state law, it is not restricted to criminal law or jurisdiction, and it is therefore a retreat from the law of the flag principle. On the other hand, it is not equivalent to *obey*, and thus can be read to

came a member of NATO in 1955 (6 U.S.T. 5707, T.I.A.S. 3428,243 U.N.T.S.308) and Spain joined in 1982. See generally NATO Information Service, The North Atlantic Treaty Organization: Facts and Figures 324-351 (1981).

⁴⁹Iceland never ratified the treaty. All other NATO members, including Greece and Turkey, had ratified it by the end of January 1956, except the Netherlands, which ratified on December 18, 1963. BGBl. 1963 II S. 745.

⁵⁰See *supra* note 4.

⁵¹The drafters' solution under article VII, NATO Status of Forces Agreement, to the problem of the conflict of sovereign interests involved in this situation was to distinguish between offenses involving the exclusive jurisdiction of either state (over offenses violating the law or security of one state but not the other), and those involving the concurrent jurisdiction over offenses which violate the laws of both states. In this latter case, the primary right of jurisdiction is granted to the sending state for offenses solely against the property, security, or member of the sending state force (including civilian members and dependents), or offenses arising out of the performance of official duty. In all other cases, the primary right of jurisdiction resides in the receiving state. This approach thus recognizes both the territorial sovereignty of the receiving state as well as the "law of the flag" principle, and represents the type of compromise between sovereign interests suggested by Brownlie and Lazareff. Similar compromises between the rights and liabilities of the respective states were made in the provisions of Article VIII concerning claims for damages caused by the sending states' forces or their members, either within or outside the performance of official duty. It should be noted, however, that under article 18 of the Supplementary Agreement, the law of the sending state will apply to any determination of whether a criminal offense has been committed in the performance of official duty.

⁵²Under article XX, the English and French texts of the agreement are equally authentic. In article II, the term "to respect" the law of the receiving state reads "respecter" in the French text. The German text uses the word "achten." For a discussion of the implications of these terms in specific context, see *infra* note 85.

retain a certain level of immunity for both the sending states' forces and their members. Lazareff considers this article to be psychologically important (because it is the first nondefinitional article of the agreement) but practically of little value, since it only mentions one specific area of application (political activity).⁵³ The "vague" nature of the article seems to be confirmed by the opinion of the U.S. interdepartmental working group that studied the provision, in which it was noted that "this provision has the effect of providing a favourable climate for the adherence to and enforcement of the laws of a host State. . . . [T]he article is one of the Agreement's expressions of the mutual respect which the signatory States hold for each other."⁵⁴ The language of the article certainly does not resolve the choices required to balance the sovereign interests indicated by Brownlie. Since there is now general agreement that conventional law has suspended customary international law in this area, Lazareff's conclusion is not particularly helpful:

[T]he main interest of this clause is to very clearly and generally affirm the principle of territorial sovereignty by subjecting members of a Force and of a civilian component as well as their dependents to the laws of the receiving State, the only possible derogations resulting either from the agreement itself or from bilateral agreements.⁵⁵

In fact, the implications of this clause for the Federal Republic of Germany are broader than Lazareff asserts, and the article applied in the specific German context causes more problems of interpretation and application than it resolves. The activities of the forces themselves, not only the actions of the members of the forces as suggested by Lazareff, can interact with the domestic law of the receiving state, both under the express language of article II and in practice, with effects on state (sovereign) interests beyond those involving immunity of individuals from local law and jurisdiction. This is especially true when the forces' activities are carried out under provisions of the Supplementary Agreement, which contain significant exemptions and qualifications from the application of local (German) law to the activities of the forces themselves. Some examples are given below;⁵⁶ it suffices here to note that much of the concern about the infringement on German sovereign interests by the activities of the sending

⁵³S. Lazareff, *supra* note 4, at 100-105.

⁵⁴*Id.* at 100.

⁵⁵*Id.* at 101.

⁵⁶*See infra* notes 87, 94.

states' forces involves this article and its relationship to the Supplementary Agreement.⁵⁷

The first stage in the process of integrating the Federal Republic into the western security system (including the NATO Treaty and its concomitant military structures and arrangements, such as the NATO Status of Forces Agreement), and recovering German sovereignty commenced with promulgation of the Basic Law and the entry into force of the Occupation Statute on September 21, 1949.⁵⁸ The major initiative in this stage was German participation in the proposed European Defense Community (EDC). Reacting to efforts by the United States to strengthen NATO's military power as a consequence of the Korean War and the perceived threat of Soviet military action against western Europe, and anxious to avoid the German rearmament supported by the U.S. without external (i.e., French) controls on that process, France proposed the creation of the EDC, to include Germany, in 1951.⁵⁹ The EDC "envisaged a supranational

⁵⁷Sennekamp states that in article II, the parties to the agreement committed themselves by contract to respect the law of the receiving state, comprising both procedural and substantive law and including federal, Land, and local laws, ordinances, and regulations. He notes that the sending states consider article II to be an obligation to respect, as opposed to observe ("achten, nicht beachten") German law, while the German authorities frequently rely on the article to impose a stronger obligation on the sending states to comply with various German laws and regulations. He concludes that conflicting interests and views must therefore be resolved in bilateral or multilateral negotiations. Sennekamp, *supra* note 19, at 2734. Beckert notes that the article is only "declaratory," since in a sovereign state only the legal regime ("Rechtsordnung") of that state can have legal force. Beckert, *Die hoheitlichen Befugnisse der Bundeswehr*, 10 *Bundeswehrverwaltung* 217, 223 (1983).

⁵⁸The occupation statute listed specific powers reserved to the Allied High Commission, which assumed authority from the Commanders-in-Chief of the occupation forces when the statute entered into force. Aside from these enumerated powers, the statute intended that "the German people shall enjoy self-government to the maximum possible degree consistent with such occupation. The Federal State and the participating Laender shall have, subject only to the limitations in this Instrument, full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions." But the statute also included a provision that "the occupation authorities, however, reserve the right, acting under instructions of their Governments, to resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government or in pursuance of the international obligations of their governments." 1 Whiteman, *supra* note 29, at 330-331. The allied powers thus retained pervasive control of German domestic and foreign policies. Nevertheless, this represented a small step towards sovereignty. See Harbecke, *supra* note 44, at 46.

⁵⁹President Truman had proclaimed a termination of the state of war between the United States and Germany, effective October 19, 1951, 16 Fed. Reg. 10,915 (1951), 50 U.S.C.A. App., at xx-xxi. This step was taken as a part of the effort to rebuild German defense capabilities against the Soviet threat. The proclamation, which ended Germany's status as an enemy but was not a peace treaty, was made pursuant to House Joint Resolution 289, 50 U.S.C.A. App., at xx (1951). Immediately after the outbreak of hostilities in Korea, Adenauer had proposed in a memorandum to the Allied High

community in charge of a joint European Army that was to be incorporated in NATO and placed under NATO supreme command,⁶⁰ but the plan collapsed when the French National Assembly repudiated the concept in August 1954.⁶¹ However, the agreements under which the EDC was conceived, and the agreements made subsequent to the breakdown of negotiations for the creation of the EDC, marked the end of the occupation regime in and purported to restore sovereignty to the Federal Republic of Germany.

The "Contractual Agreements"⁶² linked German sovereignty (and Germany's entry into NATO) to the retention of certain rights by the allied powers. The extent of sovereignty granted, and the nature of these reserved powers, was nevertheless unclear. The "grant" of sovereignty is asserted in article 1 of the Relations Convention,

Commission, dated August 29, 1950, to furnish a German contingent of military forces to any international West European army which might be created. Despite large scale protests within the Federal Republic, planning proceeded on the assumption that a new West German military force would soon come into existence. Harbecke, *supra* note 44, at 49-53.

⁶⁰Erhardt, *Europe Between National Sovereignty and Integration*, 38 *Aussenpolitik* 103, 109 (1987).

⁶¹"This supranational treaty in the most sensitive sector of sovereignty had sought to move too far in the direction of integration. Despite the Cold War the forces of the past were still too strong." *Id.*

⁶²This term is used in Bishop, *The 'Contractual Agreements' with the Federal Republic of Germany*, 49 *Am. J. Int'l. L.* 125 (1955). The agreements consist of a series of treaties (the Bonn Conventions of 1952), negotiated as part of the efforts to create the EDC, and the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany (the Paris Protocol of 1954), October 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425, 331 U.N.T.S. 254, which implemented, with amendments, the 1952 Bonn Conventions. The Bonn Conventions consist of the Convention on Relations Between the Three Powers and the Federal Republic of Germany (Relations Convention), May 26, 1952, 6 U.S.T. 4251, T.I.A.S. No. 3425, 331 U.N.T.S. 327; Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany (Forces Convention), 6 U.S.T. 4278, T.I.A.S. No. 3425, 332 U.N.T.S. 3; Finance Convention, 6 U.S.T. 4377, T.I.A.S. No. 3425, 332 U.N.T.S. 157; Agreement on the Tax Treatment of the Forces and Their Members (Tax Agreement), 6 U.S.T. 4370, T.I.A.S. No. 3425, 332 U.N.T.S. 387; and Convention on the Settlement of Matters Arising Out of the War and the Occupation (Settlement Convention), May 26, 1952, 6 U.S.T. 4411, T.I.A.S. No. 3425, 332 U.N.T.S. 219. Two related agreements also signed were the Convention on the Presence of Foreign Forces in the Federal Republic of Germany (Presence Convention), October 23, 1954, 6 U.S.T. 5689, T.I.A.S. No. 3426, 334 U.N.T.S. 3, and the Tripartite Agreement on the Exercise of Retained Rights in Germany (Retained Rights Agreement), October 23, 1954, 6 U.S.T. 5703, T.I.A.S. No. 3427. The contractual agreements entered into force in the Federal Republic on May 5, 1955, by proclamation of the Allied High Commission. 1 Whiteman, *supra* note 29, at 331. Pursuant to entry into force of the Supplementary Agreement in 1963, the Forces Convention, Tax Agreement, and Finance Convention were abrogated. Agreement on the Abrogation of the Convention on Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, Agreement on the Tax Treatment of the Forces and Their Members, and the Finance Convention, Aug. 3, 1959, 14 U.S.T. 686, T.I.A.S. No. 5351, 481 U.N.T.S. 591.

which ended the occupation regime, dissolved the Allied High Commission, and vested "the full authority of a sovereign State⁶³ over its internal and external affairs" to the Federal Republic. Important rights, however, were also reserved to the former occupying powers. Article 2 of the Relations Convention states:

[I]n view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement.⁶⁴

With regard to the allied forces still present in the territory of the Federal Republic, the Relations Convention and the Presence Convention provided (and continue to provide) the legal basis for the continued stationing of those forces in the territory of the Federal Republic. Both conventions state that after the Federal Republic of Germany acceded to the North Atlantic Treaty, "forces of the same nationality and effective strength as at that time may be stationed in the Federal Republic."⁶⁵ However, article 4 of the Relations Convention stipulates that

⁶³Bishop notes that this may not be the same thing as actually being a sovereign state. Bishop, *supra* note 62, at 131. Whether intentionally ambiguous or not, the relationship between the former occupiers and the new state, like the occupation itself, "create[ed] a situation which defies classification in terms of ordinary concepts of international law." *Id.* at 125. In his article on the domestic powers of the German armed forces, Beckett includes consideration of the "sovereign" powers of the sending states' forces ("hoheitliche Befugnisse der Stationierungsstreitkräfte") and he indicates by this phrase that the rights and privileges of the sending states' forces are evidence of the limited nature of West German sovereignty ("ein Indiz dafür, . . . daß die Bundesrepublik Deutschland nur eine eingeschränkte Souveränität habe"), if such a concept as "limited sovereignty" is possible ("falls das überhaupt begrifflich möglich sein sollte"). Beckett, *Die hoheitlichen Befugnisse der Bundeswehr*, 10 Bundeswehrverwaltung 222-23 (1983).

⁶⁴For a discussion of the significance of the term "Germany as a whole," see Bishop, *supra* note 62, at 132. Beckett notes that many observers in the Federal Republic view this provision, with its implications for continued political and defence-related restraints on Germany by the allied powers, as indicating a continued absence of sovereignty. Beckett, *supra* note 62, at 223.

⁶⁵Article 4(2) of the Relations Convention; Article 1(1) of the Presence Convention. Article 1(2) of the Presence Convention states further that "the effective strength of the forces stationed in the Federal Republic pursuant to paragraph 1 of this Article may at any time be increased with the consent of the Federal Republic of Germany." Article 3(1) states that "the present Convention shall expire with the conclusion of a German peace settlement or if at an earlier time the Signatory States agree that the development of the international situation justifies new arrangements."

[Plending the entry into force of the arrangements for the German Defence Contribution, the Three Powers retain the rights, heretofore exercised or held by them, relating to the stationing of armed forces in the Federal Republic. . . . The rights of the Three Powers, heretofore exercised or held by them, which relate to the stationing of armed forces in Germany and which are retained, are not affected by the provisions of this Article insofar as they are required for the exercise of the rights referred to in the first sentence of Article 2 of the present Convention.

Thus, articles 2 and 4 of the Relations Convention together seem to contemplate an indefinite sphere of retained rights for the former occupying powers. Bishop asserts that “on balance, this highly ambivalent language ‘seems’ to mean that the Three Powers still retain their right, based on conquest and occupation, to station armed forces in Western Germany . . . i.e., the Three Powers are, for purposes of international law, still occupants, but West Germany is not occupied.”⁶⁶ This casts further doubt on the meaning of the “grant” of sovereignty asserted in article 1 of the Relations Convention.

Under article 8, paragraph 1(b) of schedule 1 of The Forces Convention, that agreement was to remain in effect only until “the entry into force of new arrangements setting forth the rights and obligations of the forces of the Three Powers and other States having forces in the territory of the Federal Republic.” Furthermore, the new arrangements were to be based on the NATO Status of Forces Agreement, “supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic.” Lazareff, echoing the reservations expressed by Bishop about the real meaning of the grant of sovereignty to the Federal Republic in the Relations Convention, notes with regard to the Forces Convention that “the ex-Occupying Powers, whose forces had become stationed forces, were not willing to completely abandon the status they were enjoying, fearing that they would experience parliamentary difficulties if the Federal Republic were purely and simply invited to accede to the SOFA.”⁶⁷ This observation seems to confirm Bishop’s conclusion that the former occupying powers intended to grant something less than complete sovereignty to the Federal Republic under the Relations convention. It is in the light of this treaty law history that negotiations for the new arrangements contemplated

⁶⁶Bishop, *supra* note 62, at 131.

⁶⁷S. Lazareff, *supra* note 4, at 430.

by article 8 of the Forces Convention commenced in Bonn in 1955, and after four years of negotiations, culminated in the signing of the Supplementary Agreement in 1959.⁶⁸

B. PARTIAL SOVEREIGNTY AND THE SUPPLEMENTARY AGREEMENT

With the implementation of the Paris Protocol of 1954 and West Germany's entry into NATO in 1955, the Federal Republic may be said to have acquired partial sovereignty. On the one hand, it was stated that "this act reflects the recovery of sovereignty by a people, the German people. . . . Also, it reflects the exercise of that sovereignty to perfect a fellowship with other sovereign nations and to create unity out of what has been diversity."⁶⁹ On the other hand, a somewhat more reserved assessment noted:

[T]his means that the German Federal Republic has regained a political identity of its own. . . . It is equally imperative that we accord the Federal Republic the status and credit that we accord any other sovereign nation. . . . We do have jurisdiction in two or three areas that were voluntarily agreed to by the Germans, but, aside from those, we have no authority over Germany. From here on out, the Federal Republic is on its own and the course of its internal and external policy will be determined by its elected government.⁷⁰

In fact, as indicated by the reserved powers in the Contractual Agreements, and referred to obliquely in the statement above, Germany was not sovereign in the full sense of that term. Adenauer's policy of integration had succeeded in substituting "the politics of dependence" for "the politics of impotence,"⁷¹ but while the imposition of external

⁶⁸A comparison of the provisions of the Forces Convention and the Supplementary Agreement, including a study of the negotiating history of the two agreements, is beyond the scope of this paper, except where noted below. It is, however, suggested that the Forces Convention as a whole retained significant rights and privileges for the stationing forces, while relinquishing many of the rights of occupation. *See* Bishop, *supra* note 62, at 136-139 (describing certain provisions of the Forces Convention, and noting that "the Forces Convention confers on the Allied Forces rights which, while much more circumscribed than those which they have enjoyed as avowed military occupants, nevertheless go beyond anything which a NATO Power would be likely to obtain in the territory of another NATO Power"). This assessment is supported by the doubts noted previously concerning how much "sovereignty" was actually transferred to the Federal Republic under the Contractual Agreements.

⁶⁹Statement of Secretary of State Dulles, May 6, 1955. 1 *Whiteman*, *supra* note 29, at 334.

⁷⁰Statement of Deputy Under Secretary of State Murphy, June 25, 1955. 1 *Whiteman*, *supra* note 29, at 335.

⁷¹*Joffe*, *supra* note 47, at 76, 89.

constraints by the former occupation powers (in reduced form from the occupation era) had now been formally consented to through the NATO Treaty, the Bonn Conventions, and the Paris Protocol, Germany was still not capable, if it wished to do so, of rejecting the continuing constraints and reserved powers imposed by the former occupiers.

The negotiation of the **83** articles of the Supplementary Agreement, along with the Protocol of Signature to the Supplementary Agreement, the Agreement on the Abrogation of the Forces Convention, the Finance Convention, and the Tax Agreement, as well as a number of more specialized agreements,⁷² commenced in October 1955 in Bonn and concluded in August 1959. They were thus negotiated during this period of "partial sovereignty." The Memorandum of the Federal Republic to the Supplementary Agreement notes that efforts of the Federal Republic to convince the sending states to relinquish or to limit their extensive rights under the existing treaty regime met with considerable resistance. The result of the negotiations

⁷²*E.g.*, Agreement to Implement Paragraph 5 of Article 45 of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (dealing with notification of maneuvers and other training exercises); five bilateral agreements between the Federal Republic of Germany and Belgium, the United States, the United Kingdom, France, and Canada on the Settlement of Disputes arising out of direct Procurement (under article 44 of the Supplementary Agreement); Agreement between the Federal Republic of Germany and the United States of America on the Status of Persons on Leave; Administrative Agreement to Article 60 of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (dealing with telecommunications services); Agreement on the Implementation of the Customs and Taxation Provisions of the Supplementary Agreement to the NATO Status of Forces Agreement in Favor of a Force and a Civilian Component (Article 65 and Article 67 of the Supplementary Agreement); Agreement on the Implementation of the Customs and Consumer Tax Provisions of the Supplementary Agreement to the NATO Status of Forces Agreement in Favor of Members of a Force, of a Civilian Component and Dependents (Article 66 and Paragraph 6 of Article 3 of the Supplementary Agreement); United States/German Administrative Agreement on Aerial Photography; United States/German Administrative Agreement Pursuant to Paragraph 3 of Article 74 of the Supplementary Agreement (concerning prevention of abuses in employment practices, rationing, and customs and tax privileges); and diplomatic notes concerning maintenance claims, postal services, and construction. Among the more important of the many agreements entered into after the implementation of the Supplementary Agreement are those concerning land use by the sending states' forces, a series of bilateral German-sending state agreements implementing article 49 of the Supplementary Agreement on the construction of facilities for the sending states' forces (the "ABG-75" agreements), a 1984 Agreement concerning the Acquisition and Possession of Privately-Owned Weapons by Personnel of the Armed Forces of the United States in the Federal Republic of Germany, and the 1982 Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning Host Nation Support during Crisis or War.

represents a compromise between the often conflicting interests of the seven parties to the agreement. This leaves many of the various parties' desires unfulfilled, but nevertheless— from the German standpoint— it does represent a considerable improvement over the Bonn and Paris agreements.⁷³

Of the many articles of the Supplementary Agreement which, both in theory and practice, affect important German interests on a frequent basis,⁷⁴ perhaps the most significant is article 53. This article states in part:

[W]ithin accommodation made available for its exclusive use, a force or a civilian component may take all the measures necessary for the satisfactory fulfillment of its defence responsibilities. Within such accommodation, the force may apply its own regulations in the fields of public safety and order where such regulations prescribe standards equal to or higher than those prescribed in German law.

Additionally, section 3 of article 53 requires the force to “ensure that the German authorities are enabled to take, within the accommodation, such measures as are necessary to safeguard German interests.”

The relationship between article II of the NATO Status of Forces Agreement and article 53 of the Supplementary Agreement is a central issue in many of the problems which have arisen in the course of interpreting and applying the two agreements.⁷⁵ Sennekamp con-

⁷³Denkschrift zum NATO-Truppenstatut und zu den Zusatzvereinbarungen. Deutscher Bundestag, 3 Wahlperiode, Drucksache 2146, Anlage IV, 223, 224.

⁷⁴See *supra* note 10. In the area of criminal jurisdiction over members of the sending states' forces, the Supplementary Agreement gives the sending states greater rights than are available under the NATO Status of Forces Agreement. Whereas the provisions of the latter agreement give the primary right of jurisdiction to the receiving state except in certain specific cases, *see supra* note 71, the Supplementary Agreement tends to shift this balance in favor of the sending states. Under article 19, the Federal Republic automatically waives the primary right to exercise jurisdiction in cases of “concurrent” jurisdiction. This waiver may be recalled upon notice to the sending state's military authorities within twenty-one days of notification of a case falling under the concurrent jurisdiction of both states. Such a recall can be made “where the competent German authorities hold the view that, by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction.” This wording makes it clear that the recall of the automatic waiver is an exceptional action. Statistics maintained by the U.S. Army, Europe, and forwarded to the Ministry of Justice of the Federal Republic show that German authorities have recalled less than five percent of cases falling under the concurrent jurisdiction of the United States and the Federal Republic of Germany.

⁷⁵Article 2 of the Forces Convention stated that the “members of the Forces shall observe German law, and the authorities of the Forces shall undertake and be responsible for the enforcement of German law against them, except as otherwise provided in the present or any other applicable Convention or agreement.” Article 3,

cludes that the provisions of the Supplementary Agreement articles take precedence, as *lex specialis*, over the more general requirement of article II of the NATO Status of Forces Agreement.⁷⁶ The issue cannot, however, be resolved simply on the basis of a legal formula. One example which has already been mentioned is the problem of "out of area" actions by the sending states.⁷⁷ A sending state might argue that "measures necessary for the satisfactory fulfillment of its defence responsibilities" could include activities on a military installation which are directed at objects outside of the NATO area (such as refueling of aircraft, deployment of troops, and other such activities), and do not require authorization from German authorities. However, the German authorities have argued that this, in essence, would exceed the purposes of the NATO alliance, and any such actions taken without express German consent (as an essential element of sovereignty) would thus violate both the stationing agreements and West German sovereignty.⁷⁸

Another example involves the rights of the sending states' forces to use force to protect the physical security of sending states' installations in the Federal Republic, and the problem of the legal standards applicable to the use of such force. This became a problem of particular concern in the 1980's as a result of demonstrations and potential terrorist acts directed against the stationing forces. Dr. Lübbe-

however, states that "in asserting the rights and immunities accorded to them under the present Convention, the Forces shall give due consideration to German interests, public and private." Thus the forces, as compared with their members, were not obligated either to observe or respect German law. This should be contrasted with article II of the NATO Status of Forces Agreement, which requires both the forces and its members to respect receiving state law. While the criminal jurisdiction provisions of the NATO Status of Forces Agreement do in fact subject members of the forces to potential German jurisdiction, thus in essence requiring observance of German law by such members in many cases, the standard of "due consideration to German interests" under the Forces Convention was clearly a lower standard than that of "respecting" German law that is now required of the forces themselves in areas outside the application of criminal jurisdiction.

⁷⁶Sennekamp, *supra* note 19, at 2735.

⁷⁷See *supra* note 38.

⁷⁸The legal basis of such activities would rest on article 53 of the Supplementary Agreement in conjunction with article 4(1) of the Relations Convention, which states in part that "the mission of these forces will be the defence of the free world, of which Berlin and the Federal Republic form part." This language implies that the responsibilities of the stationing forces extend to the "free world," not just Europe. On the other hand, the German position relies on article 6 of the North Atlantic Treaty, which refers to "an armed attack on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France [no longer applicable], on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties."

Wolff⁷⁹ argues that, under article VII(10) of the NATO Status of Forces Agreement, measures taken by military police of the sending states' forces to maintain order and security on premises that they occupy under that agreement may be taken only within those installations" and, because the sending states' forces are present on German territory *with the consent* of the receiving state,⁸¹ these measures are governed by German law.⁸² This result, she asserts, corresponds to the general rule of international law that a receiving state yields its sovereignty, including the application of domestic law, only to the extent necessary to preserve the discipline and military readiness of the visiting forces.⁸³ According to Dr. Lubbe-Wolff, article 53 of the Supplementary Agreement is inapplicable to this situation, because the maintenance of "public order and security" is restricted to actions within the accommodation, applies only to the forces and their property, and therefore does not pertain to police actions directed at threats originating from outside the installation. Such actions are therefore governed solely by German law, which precludes measures taken by the sending states' forces under their own regulations.

Dr. Lubbe-Wolff's express reliance on the concept of sovereignty and its dual components of (police) power and consent by the receiving state evidences the current concern of many German observers about intrusions by the sending states' forces into politically sensitive areas of concern, which are often clustered in the use of the term "sovereignty." An effective response to these concerns must consider the political as well as the legal rationale behind these concerns. Batstone and Stiebritz jointly answered Dr. Lubbe-Wolff's arguments,⁸⁴

⁷⁹Lübbe-Wolff, *Die Selbstschutzrechte der in der Bundesrepublik Deutschland stationierten verbündeten Streitkräfte*, 40 NJW 2222 (1983). The introduction to the article refers to reports in the German press that U.S. soldiers were under orders to "shoot to kill" demonstrators or other persons who threatened to breach police lines around bases where nuclear weapons were stored. *Id.* at 2222.

"Article VII(10) of the NATO Status of Forces Agreement reads in part: "[The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises."

⁸¹Lübbe-Wolff, *supra* note 79, at 2222.

⁸²The specific German legislation is the Law on the Use of Direct Force by the Bundeswehr (Gesetz über die Anwendung unmittelbaren Zwanges durch die Bundeswehr). This statute does not give the sending states' forces any of the rights and powers which it gives to the Bundeswehr.

⁸³Lübbe-Wolff, *supra* note 79, at 2224. This returns to the narrow view expressed in *The Schooner Exchange v. M'Faddon*, but as indicated previously, this view does not reflect more recent interpretation of that case or the development of international law on this point.

⁸⁴Batstone and Stiebritz, *Die Selbstschutzrechte der in der Bundesrepublik Deutschland stationierten verbündeten Streitkräfte*, 14 NJW 770 (1984). Mr. Batstone is the legal adviser to the Joint Services Liaison Organisation of the British Forces in Germany. Mr. Stiebritz is a lawyer in the German Federal Ministry of Defence.

by asserting that Article VII(10), in conjunction with article 53 of the Supplementary Agreement, allows the stationing forces to apply their own regulations in this situation, as long as those regulations prescribe *standards* equal to or higher than German law as required by article 53 of the Supplementary Agreement. In light of article II of the NATO Status of Forces Agreement, this cannot be interpreted to mean the regulations must be the same as German law. If the regulations of the sending states' forces permit actions to protect persons and property belonging to the forces under conditions which meet German standards, such as those involving use of force and self-defense, then specific provisions of German law, such as the statute restricting the use of military forces in this situation to the Bundeswehr alone, do not apply.⁸⁵

This debate illustrates the type of issue which has arisen with increasing frequency over the perceived conflict between the assertion of German sovereignty and the requirements and rights of the sending states' forces. While such conflicts often involve the treaty provisions noted in the example above,⁸⁶ other provisions of the Supplementary Agreement also refer directly or indirectly to German law and standards,⁸⁷ and thus raise similar problems. Underlying the

"The problem of standards raises the problem of comparison between sending states' regulations and German law, which remains a complex and unsettled area under the agreements. The authors here suggest that such a comparison must be made, and if the forces' regulations reasonably meet standards established under German law and regulations, as interpreted by the forces, then the requirements of the agreements are met. On the other hand, it could also be argued that, apart from article 53 of the Supplementary Agreement, article VII(10) of the NATO Status of Forces Agreement, which permits the sending states' forces to take "all appropriate measures" to maintain order and security, can be exercised in accordance with article II, which as previously noted does not require the sending states' forces to observe, but rather respect, German law. In this case, there would be a legal basis under the NATO Status of Forces Agreement by itself for actions taken in accordance with sending states' regulations, which must take into consideration but without requiring a comparison with German law and standards. The authors here also point out that the German law of self-defense, unlike the Law on the Use of Direct Force by the Bundeswehr, does apply to the sending states' forces (article 12 of the Supplementary Agreement and Re article 12 of the Protocol of Signature to the Supplementary Agreement). This, in conjunction with "everyman's right of self-defense" under German law, would authorize sending states' forces to respond as necessary to protect persons and property from injury or damage.

⁸⁶Other examples include the problem of establishing and controlling security zones around aircraft and vehicle accident sites where sensitive or classified military equipment is involved, and the application of German environmental and construction regulations to activities and equipment located within sending states' forces' installations, but which may have environmental impacts outside those installations.

⁸⁷For example, Article 57(3) states that "deviations from German regulations governing conduct in road traffic shall be permitted to a force only in cases of military exigency and then only with due regard to public safety and order." Section 5 of the same article exempts the construction, design, and equipment of the vehicles of a force from German regulations if those vehicles conform to the sending state's regulations

legal arguments concerning the conflict between the requirement to respect German law and the rights and privileges of the sending states' forces enumerated in the stationing agreements is the broader question of the continuing acceptability of the Supplementary Agreement in the view of many Germans today.

A renewed desire to gain a full measure of sovereignty in the political sense, and final steps under international law to certify this status, may be traced to the Berlin crisis of 1958-1963, culminating in the Ostpolitik of the 1960's and the Grundvertrag with the German Democratic Republic of 1972.⁸⁸ Quite simply, "the [Berlin] crisis eroded the fundamental premises of German foreign policy."⁸⁹ It marked the end of realistic expectations for the reunification of Germany in the foreseeable future, underscored the limitations on Western power to oppose Soviet hegemony in eastern Europe, and elevated the strategic importance of the Federal Republic in its position as a "front-line" state against a now permanent east-west border in Europe. By the end of the 1960's, Germany's economic and military strength made it the second most powerful state in NATO, while its recognition of the political realities of eastern Europe through a series of treaties with the states of that area in the early 1970's signified the "maturity" of Germany's foreign policy.⁹⁰ From 1973, Ger-

and "subject to due regard being paid to public safety and order." Whether "due regard to public safety and order" means that domestic German legislation, such as the Road Traffic Law (Strassenverkehrsgesetz), must be observed by the sending states' forces (such legislation sometimes provides for exemptions for the Bundeswehr and for the visiting forces) unless an exemption is specifically sought and obtained, or whether actions deemed to be required by the sending states' military forces for military purposes may be taken as a matter of course, subject to the "respect" requirement of article II of the NATO Status of Forces Agreement, is a question which has caused considerable debate. Similar problems arise from activities on military installations (which fall under article 53 of the Supplementary Agreement) which cause noise or other environmental effects outside the installation, in violation of standards set by the Federal Emissions Law (Bundesimmissionsschutzgesetz). While these and similar issues contain problems specific to each of them, they also share the common problem of the increasing scope and reach of German law into areas which have become legally and politically important to German society (often expressed in terms of "sovereign" interests), and which increasingly affect sending state military activities and interests.

⁸⁸BGBI. 1973 II, S. 423ff. For a history of events surrounding the Berlin crisis, and the changes in German policies as a consequence of that crisis, see Harbecke, *supra* note 44, at 90-113.

⁸⁹Joffe, *supra* note 47, at 93.

⁹⁰For a list of the various agreements concluded by the Federal Republic with the German Democratic Republic and other eastern European states between 1970 and 1973, see *Rechtstellung Deutschlands*, *supra* note 41, at 121-217. Upon entry into force of the Grundvertrag between the Federal Republic of Germany and the German Democratic Republic in 1973, the two states entered the United Nations. The Grundvertrag did not extinguish allied rights with respect to Berlin and "Germany as a whole." Windelen, *The Two States in Germany*, 35 *Aussenpolitik* 227, 229 (1984). The Four Power Agreement on Berlin, September 3, 1971, and the series of treaties between the

many could deal on a “normal” basis under international law with every other state in the international system.

[F]or over two decades, the FRG’s foreign policy was marked by a degree of loyalty, deference, and even submission rarely seen in the annals of alliance politics. . . . In the 1970’s, the FRG could begin to assert a more “normal” foreign policy that reflected more self-assertion and less sensitivity to the claims of others.⁹¹

In short, while the occupation regime was terminated *de jure* in 1955 with the Paris Protocol of 1954 and West Germany’s subsequent entry into NATO, *de facto* sovereignty—political and legal—was postponed until international events provided opportunities for the Federal Republic to assert a greater degree of control over the external constraints on its international actions and relations.

As this brief historical review has sought to demonstrate, the Federal Republic’s evolution towards sovereignty has been reflected in parallel developments in its international political relations as well as in its international legal relations, predominantly within the NATO alliance. However, except for one minor amendment,⁹² the text of both the NATO Status of Forces Agreement and the Supplementary Agreement has remained unchanged since they entered into force in the Federal Republic of Germany in 1963.⁹³ In that year, two years after completion of the Berlin Wall, Konrad Adenauer stepped down as the first and only chancellor of the Federal Republic, having achieved his political agenda and symbolically marking the attainment of full sovereignty for the Federal Republic. Yet in spite of the fulfillment of this objective, the presence of the sending states’ forces on German territory under the provisions of the stationing agreements continues to be based on a legal regime that was created

Federal Republic and the eastern states of Europe, nevertheless eliminated the practical significance to any of the remaining occupation rights of the western allies in the Federal Republic.

⁹¹Joffe, *supra* note 77, at 105.

⁹²Agreement to Amend the Agreement of 3 August 1959 to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany. October 21, 1971, 24 U.S.T. 2355, T.I.A.S. No. 7759 (reflecting changes in German domestic labor relations).

⁹³Although proposals are made from time to time to amend key provisions of the stationing agreements, the chances of renegotiation are almost nonexistent. The difficulty in reaching agreement, the number of parties involved, the particular historical context in which the agreements were negotiated, and the present West German milieu all militate against reopening negotiations on all or part of the agreements.

and completed in an era of limited sovereignty in the Federal Republic of Germany. The question thus arises whether the two stationing agreements can retain their relevance and acceptability in the present context of full German sovereignty.

IV. NEGOTIATIONS UNDER THE STATIONING AGREEMENTS

If the question just posed is to be answered in the affirmative, then the primary method of resolving disputes under these agreements, such as those referred to in the preceding discussion, must rest in a dual process of interpreting the agreements within the context of West German concerns and interests (as expressed in the historical development of sovereignty as it applies to the Federal Republic), and of continual, flexible negotiation of specific problems.⁹⁴ This flexible, nonstatic approach must rely not just on the text of the agreements, but on “the subsequent activities in performance in varying degrees of conformity to original expectations”⁹⁵ to adapt the agreements to

⁹⁴As noted earlier, the doctrine of sovereign immunity as applied by West German courts prevents the sending states' forces from being sued directly with regard to their activities under the stationing agreements in the Federal Republic. This minimizes, though does not preclude, recourse to the judicial system by individuals or groups who oppose some or all of these activities. Such recourse is possible, however, when a provision of the agreements requires some action, such as approval or joint financing by the German federal government (usually the Ministry of Defense or the Finance Ministry), in conjunction with a sending state's force's activity. An example of one such case is a suit brought by individuals living and working near a large U.S. forces' training area to prevent construction and expansion of one of the firing ranges within that training area (Decision of August 28, 1985, of the Administrative Court (VGH) Kassel, 10NJW 677 (1986)). Under article 49 of the Supplementary Agreement and its implementing agreement (the “ABG 75,” *see supra* note 92), authorities of the German federal government must agree that certain conditions have been met before construction can commence. The court decided that provisions of the Federal Emissions Law applied to the sending states' forces (i.e., the forces must observe—“beachten”—the German law) even within accommodations made available for their use, under article 53 of the Supplementary Agreement, unless the forces' regulations impose standards equal to or higher than provided by the German law. *Id.* at 680. The legal issues are thus similar, in part, to those described in the debate about the protection of sending states' installations. Further litigation in this case is currently being pursued in the German judicial system. Another case involving a similar conflict between German law and sending states' activities (a change in use of a military airbase), with a similar result, was decided by the Administrative Court of Wiesbaden, Decision of August 6, 1985, 10 NJW 680 (1986). A review of decisions by West German courts between 1976 and 1986 indicates that cases such as these, involving major activities of the sending states' forces as a whole, rather than individual members of the forces, are a relatively recent and still uncommon type of case; however, these instances could indicate a trend toward increasing use of the courts by groups opposed to sending states' forces activities whenever the problem of sovereign immunity can be circumvented.

⁹⁵M. McDougal & W. Reisman, *International Law in Contemporary Perspective* 1194 (1981).

contemporary problems of German society. This approach is necessary, because only through such a dynamic process of interpretation and negotiation can these agreements, negotiated in a period of limited German sovereignty, continue to be widely accepted as a legal basis for regulation of the sending states' forces in the Federal Republic of Germany.

The appropriateness, as well as the necessity, of frequent review and discussion among the parties to these agreements is confirmed in the text of the agreements, in the comments of German writers, and in the provisions for consultative procedures within NATO (especially among the sending states' forces). Recognition of the need for such an approach is demonstrated by the frequency, informality, and broad range of discussions among the parties to the agreements. A recognizable pattern that emerges from these negotiations is a German concern for the protection of sovereign interests (within the framework of commitment to the NATO alliance), and a sending states' concern that the military requirements of the forces not be unduly compromised by German domestic political issues. Whether expressed openly or implied, recognition of these concerns on all sides is essential in arriving at an acceptable and useful interpretation of provisions of the stationing agreements.

Article XVI of the NATO Status of Forces Agreement states that

all differences between the Contracting Parties relating to the interpretation or application of this Agreement shall be settled by negotiation between them without recourse to any outside jurisdiction. Except where express provision is made to the contrary in this Agreement, differences which cannot be settled by direct negotiation shall be referred to the North Atlantic Council.

Article 3(1) of the Supplementary Agreement states, in part, that "the German authorities and the authorities of the forces shall cooperate closely to ensure the implementation of the NATO Status of Forces Agreement and of the present Agreement."⁹⁶ Article 3(7)

⁹⁶Article 5 of the superseded Forces Convention stipulated only that "the authorities of the Forces and the German authorities shall take appropriate measures to ensure close and reciprocal liaison." Liaison does not necessarily imply cooperation and discussion; at the lowest level it can mean simply notice. Article 3 of the Supplementary Agreement, besides requiring close cooperation in paragraph 1 (with specific areas of cooperation listed in paragraph 2) states further in section 3 that "the German authorities and the authorities of a force shall, by taking appropriate measures, ensure close and reciprocal liaison *within the scope of the cooperation* provided for in paragraphs 1 and 2 of this article" (emphasis added). This language reflects a greater concern for cooperation in the Supplementary Agreement than can be found in the earlier convention.

provides that if agreement over interpretation of either the NATO Status of Forces Agreement or the Supplementary Agreement cannot be reached on the local or regional level, the matter will be forwarded "to the competent central Federal authority and the higher authority of the force." Besides these general articles, close cooperation and negotiation of disputes is required by article 53 of the Supplementary Agreement,⁹⁷ as well as in several other articles of that agreement.⁹⁸

The German Memorandum to the NATO Status of Forces Agreement and the Supplementary Agreement notes the large number of articles which require the sending states' forces basically to follow German law,⁹⁹ and then states that special emphasis is to be placed on the requirement for continuous cooperation between the German and sending states' authorities.¹⁰⁰ It seems reasonable to conclude from this language, as well as from the numerous references to cooperation in the agreement itself, that German expectations for continued development of German sovereign interests, which could not be fully realized at the time of the negotiations for the Supplementary Agreement, were placed in substantial measure in the ability to negotiate the specific implementation and practices within concrete situations involving articles of the agreements.

This view is supported by the comments of German writers and officials on the subject of cooperation and negotiation of problems involving the stationing agreements. Sennecamp states that, because a binding interpretation of the stationing agreements was not reached during the drafting stage of those agreements, conflicting interests must be solved in bilateral or multilateral negotiations."⁷ Romann and Tetzlaff have noted that, regarding the protection of sending states' forces and their installations, cooperation between German police and the forces is not only a practical requirement, but is man-

⁹⁷ Article 53(4) reads, in part: "[T]he German authorities and the authorities of the force or of the civilian component shall cooperate to ensure the smooth implementation of the measures referred to in paragraphs 1, 2 and 3 of this Article." Re Article 53 of the Protocol of Signature to the Supplementary Agreement lists fifteen areas in which cooperation is especially (but not exclusively) required. These include public safety and order, drainage and sewage disposal, basic preservation of land and buildings, use of land and buildings by the civilian population or German authorities for business, agricultural or residential purposes, traffic precautions, and telecommunications.

⁹⁸ See, e.g., article 28 (maintenance of order and security by the sending states' forces outside accommodations); article 44 (settlement of disputes over contracts); article 55 (NATO defense works); article 69 (prevention of violation of German foreign exchange regulations); and article 74 (tax and customs matters).

⁹⁹ Denkschrift, *supra* note 73, at 224. It is unclear whether this comment is also directed specifically at article II of the NATO Status of Forces Agreement.

¹⁰⁰ *Id.*

¹⁰¹ Sennecamp, *supra* note 19, at 2734.

dated by the Supplementary Agreement.''' Kammerloher has asserted more forcefully that differences must be settled in negotiations in which the sending state concerned is bound to respect the spirit of the agreements, as incorporated in article II of the NATO Status of Forces Agreement (i.e., the requirement to respect German law).¹⁰³ This would imply that the sending states' forces must place special emphasis on article II of the NATO Status of Forces Agreement, even if they are not actually required by that article to obey German law.

This emphasis on cooperation, which from the German perspective provides a means of asserting sovereignty within the framework of the existing stationing agreements, is supported by the general importance of consultations within NATO.¹⁰⁴ The 1967 Report on Future Tasks of the Alliance (Harmel Report) stated that

as sovereign states the Allies are not obliged to subordinate their policies to collective decision. The Alliance affords an effective forum and clearing house for the exchange of information and views; thus, each Ally can decide its policy in the light of close knowledge of the problems and objectives of the others. To this end the practice of frank and timely consultations needs to be deepened and improved.¹⁰⁵

Although the consultation procedures between the sending states' forces themselves, and between those forces and the German federal, *Land*, and local authorities are not part of the formal NATO structure, tacit support for close and frequent consultations under the stationing agreements can be derived from the NATO policy.

Consultations and negotiations¹⁰⁶ occur frequently on a regular as well as an ad hoc basis at various levels of authority among the sending states and between the sending states and various levels of the German government.¹⁰⁷ Representatives and experts meet on specific

¹⁰²Romann and Tetzlaff (Ministry of the Interior), Address before the German-American Law Symposium, Heidelberg, April 9, 1987.

¹⁰³Kammerloher (Ministry of Defence), Address before the German-American Law Symposium, Bonn, March 14, 1984.

¹⁰⁴On the subject of political consultations within NATO, see generally Dannenbring, *Consultations: The Political Lifeblood of the Alliance*, 6 NATO Review 5 (1985); Kirgis, *NATO Consultations as a Component of National Decisionmaking*, 73 Am. J. Int'l. L. 372 (1979).

¹⁰⁵NATO Information Service, NATO: Basic Documents, 98-99 (1981).

''Consultations may be considered a type of negotiation that is utilized in anticipation of rather than after the occurrence of a dispute, i.e., in preventing rather than settling disputes. J. Merrills, *International Dispute Settlement* 2 (1984).

¹⁰⁷For both legal and practical reasons, the sending states' forces prefer to negotiate

subjects under the stationing agreements, such as construction plans and activities, telecommunication services to the sending states' forces, environmental problems, and exercises and maneuvers. Each sending state maintains a liaison office" that stays in regular contact with the others, as well as with various departments of the German federal government, and that organizes and sends representatives to the meetings noted above. These meetings and conferences can deal with specific problems of treaty interpretation, implementing procedures, or issues arising outside the scope of the stationing agreements that nevertheless affect the activities of the sending states' forces.

The increasing level of awareness and concern about potential conflicts between emerging German political and social concerns and the activities of the sending states' forces has been reflected in the creation and activities of several new consultative groups in recent years. In 1984 the first United States-German law symposium was held in Bonn for the purpose of establishing closer contacts between legal advisors to the German government and the U.S. forces; this has become an annual event. Among the sending states, a Host Nation Relations working group was formed within the last ten years to deal with general trends, rather than specific legal issues, of German-sending states' forces relations under the stationing agreements. At

as a unit with the German federal government, rather than separately on the federal level, or (individually or as a group) with local or Land governments (though bilateral negotiations and agreements with the latter are sometimes necessary and helpful, depending upon the particular issue involved). This preference derives from the need to maintain a relatively unified and consistent sending states' approach to interpretation of the stationing agreements, allows disagreements among the individual sending states to be resolved before negotiations with the German authorities begin, and permits the German federal authorities to have a single negotiating position presented for consideration. Also, this approach removes the need for the sending states to resolve distribution of powers problems within the German federal system.

¹⁰⁸The liaison offices of the United States, Canada, and the United Kingdom are located in Bonn; also, the French liaison office moved from French Army headquarters in Baden-Baden to Bonn in 1985. The Belgian liaison office is located with the headquarters of the Belgian forces in Germany in Koln (near Bonn). The Netherlands liaison office is located in the Ministry of Defence of the Netherlands in the Hague. The size of the missions varies from one representative (Canada) to a dozen or so (the United Kingdom). Each mission consists of at least one legal advisor and (except for Canada and the Netherlands) one or more (non-legal) military advisors. One or more of these advisors attends the regular and special meetings of the sending states' forces and the meetings between those forces and various departments of the German government. Depending upon the subject of the negotiation or consultation, technical experts from the sending states' forces are also invited to attend. The German ministries which deal on a regular basis with matters arising under the stationing agreements (predominantly the Ministries of Defence, Finance, the Interior, Justice, and the Federal Post and Telecommunications Ministry) usually designate a regular representative to meetings with the sending states' forces.

the diplomatic level, the German government has initiated a series of separate, bilateral working groups with the United States and the United Kingdom, focusing primarily on the problem of the environmental impact (especially noise) of training activities on local communities. Members of the sending states' liaison offices attend these meetings, and coordination with the regular consultative processes of the sending states' forces is maintained.

These contacts and consultative mechanisms are capable of satisfying some basic requirements of the Germans and the sending states' forces. On the German side, they provide the necessary means to interpret and negotiate the stationing agreements in a manner that will take into account the emerging political and social concerns of a fully sovereign state under the treaty regime established when those concerns were not fully developed. For the sending states, they permit a consistent and consolidated approach to interpretation of provisions of the agreements which could not be achieved in separate, bilateral negotiations. For all the parties, they constitute the necessary means for resolving disputes. Since the stationing agreements do not provide for a specific dispute resolution procedure, it is important that problems and disagreements be worked out as expeditiously, and at as low a level, as possible. In each of the specific problems noted previously in this article, strictly legal arguments over the correct meaning and interpretation of language, or broader conflicts over the assertion of national interests, are clearly inadequate. The system of negotiation and consultation which now exists is well developed, extensive, and accepted by all the parties. As long as the participants understand the context in which the stationing agreements have developed, it should be possible to reach agreement in interpreting and applying difficult provisions of these agreements.

V. CONCLUSION

The NATO stationing agreements present a dilemma for the Federal Republic of Germany. As the brief discussion of *The Schooner Exchange v. M'Faddon* and subsequent analysis of that case have sought to demonstrate, the NATO Status of Forces Agreement by itself represents a historically logical and restrained approach to the problem of balancing sovereignty between the sending states and the receiving state in an international system which, unlike that from which customary international law developed, requires a long-term presence of significant numbers of visiting forces on the territory of the receiving state. Nevertheless, the problem of the compatibility of sovereignty in its full sense with such a presence remains, as indicated by the example of France's withdrawal from the military struc-

ture of the NATO alliance. For the Federal Republic of Germany, the assertion of full sovereignty within the framework of the Supplementary Agreement as well as the NATO Status of Forces Agreement is an especially difficult problem.

The Supplementary Agreement is both a consequence of and a development in the evolving legal regime for the stationing of visiting forces in the Federal Republic of Germany. This regime was created during a period of nonexistent or limited sovereignty in that state, and some would argue that it perpetuates that condition. However, the Federal Republic of Germany has emerged from this period of limited sovereignty, and questions about the current relevance and acceptability of these agreements would seem unavoidable. An understanding of both the legal and the political dimensions of sovereignty helps explain the assumptions underlying the current debate over the interpretation and application of these agreements.

There is virtually no possibility that these agreements will be amended or abrogated in the foreseeable future,¹⁰⁹ so they will most likely continue to regulate the activities of the sending states' forces in the Federal Republic of Germany. Those forces will thus continue to have the same relatively broad rights and privileges granted to them by the agreements, which were a product of the occupation period and which, although to a more limited degree, maintained a favorable status for the sending states' forces which could not have been contemplated in the earlier commentaries on the relationship of sovereign interests involved in such situations.

It is also evident, however, that the development of full German sovereignty has required a critical examination of the legal basis for the activities of the sending states' forces, and that some accommodation of the agreements to emerging concerns of the Federal Republic is required. Germany will continue to accept the stationing agreements politically as well as legally only so long as they are viewed as

¹⁰⁹Under article XIX of the NATO Status of Forces Agreement, that agreement can be denounced by any party, such action being effective one year after notification to the United States. Under article XVII, any provision can be reviewed upon request to the North Atlantic Council by a state party. The Supplementary Agreement will lapse if the Federal Republic (or another state party) denounces the NATO Status of Forces Agreement (article 81(2)). Article 82 provides for review of the Supplementary Agreement whenever the Presence Convention is reviewed, or if one or more specific provisions "would in the view of the Party making the request be especially burdensome to that Party," in which case negotiations not exceeding three months would take place. If such negotiations failed to resolve the problem, the Secretary-General of NATO will upon application by any party use his "good offices" to make recommendations; the parties will "pay full heed to any recommendations deriving from such procedure." For the reasons stated in note 93 *supra*, it is highly unlikely that any part of the stationing agreements will be opened for renegotiation.

consistent with full sovereignty as that term has been discussed here. This means that interpretation and adaptation of the agreements to meet German political interests and legal requirements will be demanded.

Additional legal challenges to sending states' activities through the domestic judicial process can be expected, but their effect will probably remain limited. It is in the political realm of negotiation that German sovereign interests will be most forcefully asserted. The task for the German government will be to manage the domestic political concerns which will increasingly demand attention, while continuing to maintain its alliance commitments. In practice this means that the sending states will be asked to distinguish more carefully between those rights and privileges under the stationing agreements which are essential to the activities of their forces, and those in which German law and policy can be followed more closely. For their part, the sending states must be concerned with retaining the rights and privileges necessary to continue operating in the German milieu, while remaining aware of the need to be flexible with regard to provisions of the agreements that affect particularly sensitive German interests. Both sides must look beyond the text of the agreements to their broader historical and political context in order to maintain a legal and political environment in the years ahead that will help achieve the goals of all the parties.

A ROVING COMMISSION: SPECIFIED ISSUES AND THE FUNCTION OF THE UNITED STATES COURT OF MILITARY APPEALS

by Eugene R. Fidell* and Linda Greenhouse**

I. INTRODUCTION

Once again—although, happily, this time without the impetus of either a shooting war or sweeping public discontent—military justice is in a period of ferment. With developments such as the passage of legislation facilitating the exercise of court-martial jurisdiction over reservists,¹ judicial repudiation of the service-connection limitation on subject-matter jurisdiction,² reestablishment of the Court Committee,³ the hard look being given to questions as basic as the constitutional status of the United States Court of Military Appeals,⁴ and the spurt of public interest that comes with a string of relatively highly-publicized courts-martial and appeals,⁵ it is desirable to revisit aspects of the system that may have escaped recent, comprehensive scrutiny.

This paper considers one such aspect—the court's specification of appellate issues—not so much for its intrinsic interest as for the window it offers from which to survey larger questions concerning the Uniform Code of Military Justice, the court, and the place of each in our legal system.

*Partner, Klores, Feldesman & Tucker, Washington, D.C. B.A., Queens College, 1965; LL.B., Harvard Law School, 1968. This paper was presented at the Twelfth Criminal Law New Developments Course, The Judge Advocate General's School, Charlottesville, Virginia, on August 17, 1988.

**Reporter, Washington Bureau, The New York Times. B.A., Radcliffe College, 1968; M.S.L., Yale Law School, 1978. Ms. Greenhouse covers the Supreme Court of the United States for The New York Times.

¹Uniform Code of Military Justice art. 2(a)(3), (d), 10 U.S.C.A. § 802(a)(3), (d) (West Supp. 1988) [hereinafter UCMJ], added by National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 804(a), 100 Stat. 3906.

²*Solorio v. United States*, 107 S. Ct. 2924 (1987).

³Reestablishment of the Court Committee, 25 M.J. 154 (C.M.A. 1987).

⁴Legislation was introduced in 1987 to make the court an article III tribunal. S. 1625, 100th Cong., 1st Sess. (1987). See generally Everett, *Justice in Uniform*, 26 Judges' J. 29 (1987).

⁵Examples include U.S. Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988); *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988); and *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

A 1980 article in *The JAG Journal*⁶ examined the court's practice of specifying issues for briefing and argument on its own motion. At the time, it seemed noteworthy that the incidence of such issues appeared to have fallen below the historic level of about one-third of the total issues granted review. The article concluded that the practice should remain in effect but should be "reserved for use in the truly extraordinary case. In the unlikely event the quality of appellate defense practice changes radically for the worse the Court will then be in a position to reevaluate the need for a more intrusive review at the petition stage."⁷

Since then, the practice of specifying issues has continued, although the rate of specification has fluctuated.⁸ With a complete turnover on the bench, as well as passage of the Military Justice Act of 1983 (opening the door to the direct review in the Supreme Court for some military cases)⁹ and serious attention being given once again¹⁰ to basic changes in the status of the Court of Military Appeals, the time has come for a critical appraisal of the practice and its implications for the court and for military justice.

We conclude that specification of issues as still practiced by the court is out of step with the mainstream of American judicial practice, is a throwback to an earlier and more paternalistic age in the history of modern American military justice, and constitutes a needless source of interinstitutional and benchbar friction.

11. THE COURT'S THREE FREEDOMS

When Congress enacted the Code, it set in motion an essentially new piece of judicial machinery with a broad institutional mandate. In its early years, the Court of Military Appeals benefited from three kinds of independence. First, Congress made it clear that the vast bulk of the court's jurisdiction would be discretionary, like that of the Supreme Court's certiorari jurisdiction. Thus, except for death and

⁶Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99 (1980) [hereinafter *Specification of Issues*].

⁷*Id.* at 120.

⁸According to the Court of Military Appeals' annual statistical reports, the percentage of cases in which the court specified issues not raised by the appellant was approximately 30% in FY81, 34% in FY82, 54% in FY83, 31% in FY84, 26% in FY85, and 20% in FY86 and FY87.

⁹10 U.S.C. § 867(h) (Supp. IV 1986); 28 U.S.C. § 1259 (Supp. IV 1986).

¹⁰See also Off. of Gen'l Counsel, Dep't of Defense, Reform of the Court of Military Appeals (1979); Off. of Gen'l Counsel, Dep't of Defense, Report of the Dep't of Defense Study Group on the U.S. Court of Military Appeals (1988).

(at first)” general and flag officer cases, and cases certified by the Judge Advocate Generals, the court was free to accept or reject cases depending on its highly subjective sense of whether “good cause” existed.

Second, the court read its mandate as leaving it free “to find its law where it will, to seek, newfledged and sole, for *principle*, unhampered by the limiting crop of the years.”¹² The Brosman Doctrine, which is a source of the court’s vulnerability,¹³ continues to reverberate in the court’s jurisprudence.

Third, the court “has traditionally reviewed meritorious issues which were not assigned by an appellant or his counsel”¹⁴ or certified by The Judge Advocate General.¹⁵ This practice is tied to the court’s independent examination of the record. One might have thought that the original congressional insistence that petitions be granted or denied within 30 days precluded such a review.¹⁶ History teaches, however, that rather than discouraging *sua sponte* identification of issues, the original statutory deadline simply fostered judicial reliance on staff attorneys.¹⁷ Whether or not this was logical or sensible at the outset, it is beyond dispute that the practice of specifying issues grew up early and is as firmly rooted today as ever.

Taken in isolation, none of the court’s three freedoms seems particularly remarkable. The power to pick cases as a matter of discretion is a familiar one in American appellate justice. Similarly, that unusual doctrinal freedom was thought appropriate when the Code was in its salad days hardly comes as a surprise. And there is certainly nothing startling about an appellate court spotting errors on its own motion and directing that they be briefed.

The problem, therefore, lies not in the area of principle but in the *combination* of these three freedoms in a single tribunal (especially one that was for most of its four decades of existence immune from

¹¹The Code was amended in 1983 to remove the special treatment afforded to general and flag officer cases. Military Justice Act of 1983, Pub. L. No. 98-209, § 7(d), 97 Stat. 1402.

¹²Brosman, *The Court: Freer Than Most*, 6 Vand. L. Rev. 166, 167-68 (1953) (emphasis in original).

¹³Fidell, “*If a Tree Falls in the Forest . . .*”: *Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1, 9 n.55 (1982) [hereinafter *Tree in Forest*].

¹⁴*United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987).

¹⁵*E.g.*, *United States v. Banks*, 7 M.J. 92, 93 n.3 (C.M.A. 1979).

¹⁶The 30-day deadline was repealed in 1981. Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1088.

¹⁷D. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume 223* (1974) [hereinafter *Staff and Process*].

direct review in the Supreme Court), and in the degree to which the third freedom is treated as a license to depart from the usual norms of appellate process. The institutional implications of these overlapping and interactive freedoms have not been fully explored. Moreover, those implications have changed as other aspects of the military justice system have matured over time.

Of the three, the freedom to pick cases has been least subject to change for the simple reason that Congress imbedded it in the statute. Had Congress seen fit, five years ago, to subject denials of review to Supreme Court review by writ of certiorari, things might be different; but as it is,¹⁸ the power of the court of Military Appeals to determine at least which petition cases it shall hear remains essentially where it was in 1951.¹⁹

The years have not been as kind to the second freedom: the power to select the rule of decision. Article 36 now provides that the rules of pretrial, trial, and post-trial procedure, and the rules of evidence, including modes of proof, shall be as provided by the President, who shall, insofar as he deems practicable, follow the rules generally recognized in the trial of criminal cases in the district courts." While there was a time when it appeared that this would be a lively doctrinal area, events have not borne this out, and the "sleeping giant" of article 36, having "stirred,"²¹ slumbers on. In large measure this is due to the fact that Congress nipped in the bud an effort by the Court of Military Appeals to confine the President's power under article 36

"The Military Justice Act of 1983 expressly excluded from review cases in which the Court of Military Appeals has denied a petition for review. UCMJ art. 67(h), 10 U.S.C. § 867(h) (Supp. IV 1986). In the rare cases in which a petitioner has sought certiorari with respect to denial of a petition for review, certiorari has properly been refused. Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 Mil. L. Rptr. 6001, 6002 & n.10 (1988) [hereinafter *Supreme Court Review*] (collecting cases).

"The petition jurisdiction was slightly expanded when the court allowed the government to petition for review in court of military review extraordinary writ cases. *United States v. Caprio*, 12 M.J. 30 (C.M.A.) (2-1), *pet. denied*, 12 M.J. 321 (C.M.A. 1981) (mem.). To be sure, the court's own extraordinary writ jurisdiction was nonexistent in the early years and has waxed and waned since it was first asserted. It remains highly discretionary, and at least as quirky and unpredictable as the process by which review is granted on petition of the accused. *U.S. Navy-Marine Corps Court of Military Review v. Carlucci, supra*, may signal a new high water mark in this regard through its creative, albeit unpersuasive, reliance on the hypothetical prosecution of the court of military review judges for disobedience of orders of the Judge Advocate General of the Navy as a predicate for All Writs Act jurisdiction. *Id.* at 333, 335-36.

"UCMJ art. 36(a).

"See generally Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L. Rptr. 6049 (1976) [hereinafter *Sleeping Giant*].

to the trial proper,²² and to the fact that through the Military Rules of Evidence, much district court jurisprudence has been formally embraced.

On the other hand, the Executive Branch may have subtly expanded the court's doctrinal authority. Thus, article 36(a) confers upon the President broad if not unlimited discretion to determine when a civilian federal rule of evidence or criminal procedure is impracticable for the military.²³ The 1969 *Manual for Courts-Martial* had provided that the civilian federal rules of evidence or, failing a federal rule, the common law, would be applied to questions of evidence not otherwise governed by the Code or by the *Manual*.²⁴ Significantly, paragraph 137 seemed to leave the judiciary no discretion to make a practicability determination (although it is certain that the court made such determinations from time to time, albeit perhaps only *sub silentio*).

In 1980, the Military Rules of Evidence superseded paragraph 137. They provide, in what might be called the "residuary clause" of Rule 101(b), that (failing an express provision of the *Manual*) the courts shall resort to "(1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and (2) Second, when not inconsistent with [such rules], the rules of evidence at common law." At first glance this appears to replicate the 1969 *Manual's* approach, and Rule 101(b) has been commonly so understood.²⁵ But the introductory clause of subdivision (b) of the Rule must be examined as well, for it states that these two "secondary sources" of the law of evidence "shall apply" only "insofar as practicable" (and, of course, if not inconsistent with the Code or the *Manual*). That is, the President has now expressly left it to the judiciary to determine when a civilian federal evidentiary rule or common law doctrine is practicable.

In short, whereas the 1969 *Manual* seemed to exercise the power to determine practicability, the Military Rules of Evidence seem to delegate that power to the courts. The effect of this change is either to provide a firmer footing for the court's past practice if it has been making practicability determinations, or, if it has not, then to expand

²²See Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801(b), 93 Stat. 811, *amending* UCMJ art. 36(a).

²³UCMJ art. 36(a); see *generally Sleeping Giant*, *supra* note 21, at 6054-58.

²⁴See *Manual for Courts-Martial, United States, 1969* (Rev. ed.), paragraph 137.

²⁵See *Manual for Courts-Martial, United States, 1984*, Mil. R. Evid. 101(b) [hereinafter Mil. R. Evid.] analysis, app. 22 at A22.2; S. Saltzburg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual* 7-8 (2d ed. 1986).

the court's residual power to accept, reject, or tinker with the civilian rule, at least as to matters of evidence. As such, it is of a piece with the Brosman Doctrine.

Note, however, that the Military Rules of Evidence do not exhaust the President's broad rulemaking power under article 36. As to nonevidentiary rules, it would seem that the President has, by implication, not delegated his authority to make practicability determinations. This leaves open the question of the extent to which such determinations may be subject to judicial review. In this regard a footnote in a 1986 memorandum opinion may prove significant. In *United States v. Harvey*,²⁶ the court observed that it was not compelled to decide whether it would be bound by a *Manual* provision that "displaced" a judicial decision construing an article of the Code. The fact that the court would even flag such an issue suggests that, whether or not it is aware of the nuances of the shift from paragraph 137 to M.R.E. 101(b) concerning practicability determinations, it will not easily relinquish its doctrinal freedom or residual rulemaking turf, even though the reason for that freedom—the need to put flesh on the bones of a new legislative skeleton—no longer obtains.

It might be thought that the promulgation of the Military Rules of Evidence required the court to embark on yet another career of rule selection and filling-in of doctrinal interstices, much as was the case when the Code itself was enacted. The analogy fails because, in addition to the fact that the Military Rules of Evidence largely adopt rules that have received a plentiful gloss from the article III courts, nearly a decade has already elapsed since the President issued these rules. The "breaking-in period," if any was needed, must be over by now.

This leaves the third freedom that the court claimed: the freedom to frame its own issues. One could argue that it emerged from the same wellspring as the Brosman Doctrine—the need to flesh out the Code's jurisprudence as quickly as possible, in the interest of reducing uncertainty in a jurisdiction where military exigencies may at any moment become paramount. Or one could argue that it reflected the notion that unusually active civilian judicial oversight was necessary in order to make up for shortcomings in the representation of defendants in courts-martial.

If the former was the impetus, it no longer enjoys any force, because military law is, and for at least a decade has been, "*a mature, substantial and essentially coherent corpus juris*, which can stand—sup-

²⁶23 M.J. 280 n.* (C.M.A. 1986)(mem.)

port its weight—without the need to rely on unnecessary doctrinal buttressing.”²⁷

And if the impetus was concern about the effective assistance of counsel on appeal, it is equally clear that times have changed dramatically—and in ways pertinent to this issue—since the early 1950’s. A system that once relied extensively—at least at the trial level—on nonlawyer counsel, has for many years relied almost not at all on lay counsel. Military defendants have a right to lawyer counsel on appeal.” Each service has a professional discipline mechanism in place, and the Code insulates appellate counsel from lay commanders by requiring that the former be assigned to the Office of The Judge Advocate General.” On these facts, a heavy burden must be shouldered in order to justify retaining a nonadversarial layer of scrutiny to provide a judicial quality assurance program with respect to the work of military appellate attorneys.

In summary, the court’s three freedoms—to select cases, to select rules of decision, and to frame issues—may have come into being at about the same time, but they stand on different juridical footings, and, in the case of the latter two, have been substantially eroded by subsequent events. The wonder is that the third freedom—the power to specify issues—has not been more controversial.

111. WHY ISSUES ARE SPECIFIED

If the reasons that impel the Court of Military Appeals to grant a petition for review remain obscure, the criteria the court applies in deciding whether to specify an issue are even more mysterious. The court has given few clues in this regard, and precious little can be gleaned from the reported decisions.

What little we know is easily summarized. The Central Legal Staff reviews all incoming cases, even—or perhaps, particularly—where counsel have asserted no issues in the supplement to the petition.³⁰ The court has not officially published its operating procedures.³¹ It prepared a brief summary in 1974,³² but the court has not updated the summary in the literature since that time.

²⁷*Sleeping Giant*, *supra* note 21, at 6059 (emphasis added).

²⁸UCMJ art. 70.

²⁹*Id.*

³⁰*United States v. Grostefon*, 12 M.J. 431, 436 n.12 (C.M.A. 1982).

³¹Under the Federal Courts Improvement Act of 1982, 28 U.S.C. § 2077 (1982), the operating procedures of article III courts of appeals must be made public. The statute does not apply to the Court of Military Appeals, but there is no reason that court could not take on the responsibility on its own motion.

³²Staff and Process, *supra* note 17, App. D at 217-24.

The staff "has been especially effective in helping the judges formulate issues for review and in helping them screen out cases in which review should be denied."³³ Its functions may be broken down into three categories. First, it reviews pleadings for formal compliance with the court's Rules of Practice and Procedure. Rule 36(b) provides that the court may issue an order to show cause, dismiss the proceeding, or return papers on its own motion or on motion of a party for violation of the Rules or an order of the court.³⁴ This aspect of the staff's review includes issues of timeliness³⁵ and whether the court's statutory jurisdictional threshold has been met.³⁶

Second, in the course of searching the record, the staff looks for—and not infrequently finds—technical problems with the papers. For example, it is not uncommon for the court to note formal errors such as incorrect social security account numbers,³⁷ omission of the punitive article the accused violated,³⁸ or the precise offense.³⁹ Other formal defects, such as a court of military review's purported approval of a remitted part of a sentence⁴⁰ or errors in court-martial orders,⁴¹ also presumably fall within this category of the staff's functions.

Third, either by its own lights or with guidance from the judges,⁴² the staff frames issues for the court's specification, typically⁴³ with a

³³Everett, *supra* note 4, at 32.

³⁴See also Court of Military Appeals Rule 34(b) (1977), discussed in E. Fidell, Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals 60-61 (1978) and 11 (Supp. 1980). For purely technical errors, it probably is a waste of time for opposing counsel to dwell on the violation. Cf. Clark v. United States, 14 Cl. Ct. 397 (1988) (Smith, C.J.) ("Clerk's Office will promptly bring the matter to the court's attention").

³⁵United States v. Bryant, 5 M.J. 120 (C.M.A. 1978).

³⁶United States v. Spencer, 8 M.J. 30 (C.M.A. 1979).

³⁷United States v. Joseph, 22 M.J. 255 (C.M.A. 1986) (mem.); United States v. Apelquist, 18 M.J. 440 n.* (C.M.A. 1984) (mem.); United States v. McDermott, 18 M.J. 1 n.* (C.M.A. 1984) (mem.).

³⁸United States v. King, 16 M.J. 321 n.* (C.M.A. 1983) (mem.).

³⁹United States v. Gutche, 15 M.J. 307 n.* (C.M.A. 1983) (mem.).

⁴⁰United States v. Smith, 23 M.J. 281 n.1 (C.M.A. 1986) (mem.); cf. United States v. Adams, 17 M.J. 94 n.* (C.M.A. 1983) (mem.) [impropriety of convening authority's direction as to forfeitures].

⁴¹E.g., United States v. Allen, 23 M.J. 281 n.2 (C.M.A. 1986) (mem.) (failure to reflect findings as to each specification, guilty pleas, and trial judge's dismissal of a charge and specification after findings); United States v. Matthias, 17 M.J. 111 n.1 (C.M.A. 1983) (mem.) (sundry errors and omissions in promulgating order!); United States v. Andrews, 17 M.J. 111 n.2 (C.M.A. 1983) (mem.) (court-martial order's failure to reflect withdrawal of part of specification prior to entry of findings).

⁴²The extent of guidance from the judges to the staff lawyers is unclear. A 1974 study reported that "[the commissioners [forerunners of the current Central Legal Staff attorneys] are relied on almost entirely to search the record for errors not asserted in the petition." Staff and Process, *supra* note 17, at 220.

⁴³On occasion, the Court specifies an issue and disposes of it summarily at the same

view to plenary briefing and argument as in the case of issues that the court grants after the petitioner has raised them.⁴⁴ This third category is the most troublesome, for it goes beyond mere housekeeping either under the court's own rules or as to administrative paperwork requirements relating to the record of trial and promulgation of court-martial results.

A few details emerge from a little-noted order that denied reconsideration of the denial of a petition for review. In *United States v. Roukas* the court said:

[I]t appears that appellant has not shown that the Court overlooked or misconstrued his original petition for grant of review. Appellant's petition for grant of review was submitted without specific assignment of error. Consequently, the Court examined [1] the providence of his pleas, [2] the possibility of any error of law with regard to sentence, and [3] review[ed] the record of trial to insure that appellant was not denied military due process. The assignments of error in the petition for reconsideration do not raise any issue not considered by the court in carrying out its statutory mandate. Article 67(b), Uniform Code of Military Justice, 10 U.S.C. § 867(b). Accordingly, it is ordered that the petition for reconsideration is denied.⁴⁵

This text is as rich as it is brief. For one thing, it confirms that the court believes it has a *duty* under the statute to conduct an independent review of the record.⁴⁶ For another, the use of the word "consequently" implies that it would *not* have performed such the review described had Roukas filed a petition that asserted some particular

time. *E.g.*, *United States v. Joyner*, 25 M.J. 257 (C.M.A.1987) (mem.). It may also specify an issue and remand to the court of military review for briefing and decision. *E.g.*, *United States v. Jefferson*, 18 M.J. 411 (C.M.A.1984) (mem.); *United States v. Long*, 18 M.J. 290 (C.M.A.1984) (mem.); *United States v. Diaz*, 18 M.J. 282 (C.M.A.1984) (mem.).

⁴⁴The court may also rephrase an issue initially framed by the petitioner. These are sometimes described as "granted" rather than "specified" issues, *e.g.*, *United States v. Emmendorfer*, 23 M.J. 408 (C.M.A. 1987) (mem.), although at other times the court purports to specify even though the result is merely a relatively minor recasting of an issue framed by the petition. The data presented below do not examine this factor, which tends to overstate the incidence of specification.

⁴⁵21 M.J. 293 (C.M.A.1985) (mem.) (bracketed numbering supplied).

⁴⁶*See also Hearings on Department of Defense Appropriations, Fiscal Year 1982, Before the Sen. Comm. on Appropriations, 97th Cong., 1st Sess., Pt. 5, 392-93 (1981)* (statement of Everett, C.J.) ("I doubt that any other appellate court having discretionary jurisdiction makes a more detailed review of the record to insure that no prejudicial error has been committed. Over the years the Court of Military Appeals has considered this part of our statutory duty.").

error. This implication is plainly false. “[E]ven a case submitted . . . on the merits is perused for possible issues undetected below.”⁴⁷ To be sure, the court has specified issues where the petitioner assigns none,⁴⁸ but it regularly specifies issues in cases in which the petitioner *has* assigned error.⁴⁹ Even if the court is under a duty to examine the record for unassigned errors, it retains discretion to decide what to do with what it finds.⁵⁰ For example, it can specify an issue and remand for consideration by the court of military review.”

⁴⁷United States v. Grostefon, 12 M.J. at 436 n.12 (“An accused may submit a petition for review to us without assigning specific issues.”).

⁴⁸*E.g.*, United States v. Onart, 25 M.J. 373 (C.M.A. 1987) (mem.). See also United States v. Onart, 24 M.J. 225 (C.M.A. 1987) (mem.) (ordering oral argument on motion to file supplement to petition out of time). One study showed that over a five month period some years ago, 152 petitions were filed in which no issues were identified: seven of these “pro forma” cases were granted review. All 152 cases involved guilty pleas. Staff and Process, *supra* note 17, at 221.

⁴⁹A particularly clear illustration of this is United States v. Breseman, 24 M.J. 326 (C.M.A. 1987) (mem.) (granting review on twenty assigned issues and specifying one). *aff’d*, 26 M.J. 398 (C.M.A. 1988).

⁵⁰United States v. Kelly, 14 M.J. 196, 200-01 (C.M.A. 1982) (claiming discretion to consider issues raised by accused or specified by court in cases reviewed by C.M.R. under UCMJ art. 69, and certified to C.M.A. under art. 67(b)(2)). In one case where a court of military review ordered a sentence rehearing, the Court of Military Appeals, stressing its own discretion, denied a *pro forma* petition for review without prejudice to the appellant’s right to petition again in the normal course of appellate review. United States v. Graham, 21 M.J. 97 n.* (C.M.A. 1985) (mem.). The propriety of issueless petitions was not questioned, but the fact that no issues were assigned arguably helped tip the scales against a grant at that juncture. Nor does the court merely tolerate such petitions; it has an institutional commitment to them. Thus, in United States v. Kuskie, 11 M.J. 253 (C.M.A. 1981)(2-1), after having denied review, 10 M.J. 179 (C.M.A. 1980) (mem.), it ordered proceedings abated and all rights, privileges and property restored because the appellant died between the time his issueless petition was filed and the time it was denied. Notwithstanding Judge Cook’s well-taken dissent on the basis of *Dove v. United States*, 423 U.S. 325 (1976), *Kuskie* remains good law. *E.g.*, United States v. Jarvis, 23 M.J. 359 (C.M.A. 1987) (mem.); United States v. Kelley, 22 M.J. 118 (C.M.A. 1986) (mem.); United States v. Wright, 17 M.J. 188 (C.M.A. 1983) (mem.) (2-1).

Whether or not it was correctly decided as to the abatement, quere whether an issueless case such as *Kuskie* represents a suitable vehicle for an important holding, especially given guilty pleas, a lack of the prejudice required by UCMJ art. 59(a), see *Kuskie*, 11 M.J. at 255, a failure to raise in the court of military review any issue going to the findings, *id.*, and, as Judge Cook pointed out, the failure of the court’s own review of the record to disclose error. *Kuskie*, 11 M.J. at 256 (Cook, J., dissenting). Similarly, in *Grostefon* the court chose a case in which none of the issues the accused desired to press had merit as a vehicle for announcing the procedure for identifying such issues. 12 M.J. at 437 & n.14. Arguably the court’s point stands out more sharply, because *Grostefon* came up on a *pro forma* petition, but one wonders whether the larger interests at stake would have been better served had the new rule been announced in a case where it made a difference. See also, *e.g.*, United States v. Caprio, 12 M.J. 30 (C.M.A.) *pet. denied*, 12 M.J. 321 (C.M.A. 1981); United States v. Ortiz, 24 M.J. 323 (C.M.A.), *pet. denied*, 25 M.J. 238 (C.M.A. 1987) (mem.).

⁵¹See, *e.g.*, United States v. Jefferson, 18 M.J. 411 (C.M.A. 1984); United States v. Long, 18 M.J. 290 (C.M.A. 1984).

Of the three categories⁵² noted in *Roukas*, the first is familiar territory; it is difficult to understand why appellate defense counsel could not be relied upon to confirm the presence or absence of even arguable error in that regard. If anything, the second category seems even more straightforward and less in need of a continuing helping hand from the court or its staff. The third is the “wild card,” for the notion of “military due process” is so amorphous and open-ended that it implies an unlimited review subject to no known or knowable criteria. If this category extends to errors such as convictions barred by the statute of limitations, however, or to matters as familiar as the possible existence of a conflict of interest on the part of counsel,⁵³ once again its necessity seems open to question.

The reasons for the third category are simple: the court appears to subject specified issues to no higher standard of “good cause”⁵⁴ than granted issues (*i.e.*, those advanced by a party), and has failed to channel its own discretion in respect of the one as much as the other.⁵⁵

This, in turn, should require consideration of the judges’ philosophy regarding “good cause.” Regrettably, but not surprisingly, the crystal ball they have given the bar is cloudy. The court’s rules require a majority vote in order to grant review.⁵⁶ While there have been times that the court has granted review when only one judge thought “good cause” had been shown,⁵⁷ the court is evidently not in such a phase at present, since it recently denied review over a dissent.⁵⁸

⁵²A fourth category of record examination occurs when the government confesses error. *E.g.*, *United States v. Cook*, 24 M.J. 407 (C.M.A. 1987) (mem.); *United States v. Chasteen*, 24 M.J. 62 (C.M.A. 1987) (mem.). This is fully in keeping with the practice of other appellate courts, *Specification of Issues*, *supra* note 6, at 118-19, and does not raise institutional issues such as those presented by the *Roukas* “shopping list.” The court can also specify an issue at oral argument. *E.g.*, *United States v. Lawless*, 18 M.J. 255, 257 n.2 (C.M.A. 1984); *United States v. Strangstalien*, 7 M.J. 225, 227 (C.M.A. 1979). *See also* *United States v. Fimmano*, 8 M.J. 197, 200 n.9 (C.M.A. 1979); *United States v. Talavera*, 8 M.J. 14, 15 (C.M.A. 1979). To the extent that such issues emerge directly from the parties’ adversarial presentations in open court, they do not raise the institutional concerns addressed in this paper.

⁵³*United States v. South*, 25 M.J. 226 (C.M.A. 1987) (mem.) (issue specified on petition for new trial).

⁵⁴UCMJ art. 67(b)(3).

⁵⁵The court has thus far not accepted the suggestion that it articulate in its rules the considerations governing the granting of review. A 1982 proposal to that effect by the court’s Rules Advisory Committee was deleted by the judges when the time came to promulgate major rule changes. The committee has again approved the idea for action by the court. *See Supreme Court Review*, *supra* note 18, at 6006 (reproducing proposal).

⁵⁶Court of Military Appeals Rule 6(a).

⁵⁷*See* *W. Generous, Swords and Scales* 77 & n.14 (1973); *Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel, Sen. Comm. on Armed Services*, 97th Cong., 2d Sess. 213 n.14 (1982) (statement of Eugene R. Fidell).

⁵⁸*United States v. Camacho*, 25 M.J. 367 (C.M.A. 1987) (mem.) (Everett, C.J., dis-

Two votes being necessary, the question remains as to what "good cause" standard the court applies. Judging by *United States v. Mason*, one might think that one member of the court, Judge *Cox*, is of the view that the court should grant review only if the case has merit, thus collapsing the ultimate merits into the threshold question of "good cause." His dissent observed: "I believe the issue raised in the petition is without merit. Accordingly, I dissent from granting it. If it may have any merit, then we should grant, require briefs, and have oral argument before deciding the issue."⁵⁹ Actually, however, rather than shedding light on "good cause" standards, this seems to be merely an objection to summary disposition. All that is required for the staff to recommend specification is that an error be "arguable." According to a 1974 study, the staff attorneys

do not confine themselves to the points raised in the petitions. They read the complete record and discuss in the [case] memorandum all defects of any arguable substance. The judges consider themselves as primarily, though not exclusively, concerned with error correction. A petition will be granted if two of the three judges think there is the likelihood of any prejudicial irregularity, even though the issue may be of no general legal or constitutional importance. On the other hand, a petition will sometimes be granted because it presents a novel or important question, or there is a conflict between two Courts of Military Review, even though the judges think the result below is correct. The Commissioners prepare the memoranda with all these considerations in view.⁶⁰

senting). In a number of cases the Chief Judge has indicated, in dissents from the denial of petitions, particular issues he would have had the court specify. *E.g.*, *United States v. Jackson*, 14 M.J. 446 (C.M.A. 1982) (mem.) (Everett, C.J., dissenting); *United States v. DeRoche*, 11 M.J. 413 n.1 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting); *United States v. Weaver*, 11 M.J. 406 n.2 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting); *United States v. Lawrence*, 11 M.J. 406 n.1 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting); *United States v. Perry*, 11 M.J. 402 n.2 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting); *United States v. Petrus*, 11 M.J. 402 n.1 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting); *United States v. Castillo*, 11 M.J. 163 (C.M.A. 1981) (mem.) (Everett, C.J., dissenting). Conversely, Judge Cook several times dissented from orders specifying issues. *United States v. Holt*, 15 M.J. 444 (C.M.A. 1983) (mem.) (Cook, J., dissenting from grant of review); *United States v. Didas*, 14 M.J. 446 (C.M.A. 1982) (mem.) (Cook, J., dissenting from grant of review).

⁵⁹24 M.J. 127, 128 (C.M.A. 1987) (mem.).

⁶⁰Staff and Process, *supra* note 17, at 219. That a case presents a question of first impression does not guarantee a grant of review. *E.g.*, *United States v. Ruffin*, 13 M.J. 494 (C.M.A. 1982) (mem.) (Everett, C.J., dissenting). Where a decision conflicts with another ruling by the same panel of a court of military review, the Court of Military Appeals remands so that the lower court can resolve the conflict. *United States v. Lopez*, 26 M.J. 40 (C.M.A. 1988) (mem.).

IV. IS SPECIFICATION AN EMPTY GESTURE?

The danger that a staff search for error “may result in dredging up matters of little or no consequence which the parties themselves have already decided to abandon”⁶¹ is inherent in the process employed by the Court of Military Appeals. Because specified issues do not reflect the litigants’ own review of the record, they present a real danger of wasted effort through improper framing⁶² or improvident grants.⁶³ To date, there have been no studies of the extent to which petitioners benefit, in real-world terms, from the practice of specifying errors, just as there is less than satisfactory information regarding the reversal/affirmance rate in general at the court.⁶⁴ Failing the kind of long-term and ultimate-outcome-on-remand data one would prefer, we can still draw some inferences from the data for decided cases in which issues were specified in 1986-87.

As seen from the table annexed to this article, specified issues are often, if not invariably, a waste of time.⁶⁵ While the “batting average” for useful relief is low given the fact that these are cases in which the judges took what one would think was the unusual step of identifying issues of interest to them—a step that presumably signals a higher probability of reversal than if counsel frame an issue—appellants have gotten real relief from time to time through specification.⁶⁶

⁶¹Meador, *Professional Assistance for Appellate Judges: A Central Legal Staff*, 63 F.R.D. 489, 494 (1974).

⁶²*E.g.*, United States v. Lawless, 18 M.J. 255, 257 & n.2 (C.M.A. 1984) (noting that specified issue “is somewhat misleading,” and specifying another in the course of oral argument).

⁶³*E.g.*, United States v. Mercer, 19 M.J. 137 (C.M.A. 1984) (mem.) (granting review on specified issue, *aff’d mem.*, 21 M.J. 28 (C.M.A. 1985) (on further consideration of granted issue and record of trial, evidence held sufficient to support conviction); United States v. Kohler, 7 M.J. 474, 475 (C.M.A. 1979); United States v. Manchette, 7 M.J. 385, 393 (C.M.A. 1979). In United States v. Charbonneau, 5 M.J. 205 (C.M.A. 1978) (mem.), the court vacated as improvident a five-month-old grant of review on an assigned issue.

⁶⁴The court’s annual reports indicate Master Doctet reversals in whole or in part, but such reversals are often of little practical value to the appellant, as where the sentence is left intact but some adjustment is made in the findings.

⁶⁵*But see* United States v. Sumpter, 22 M.J. 33, 34 (C.M.A.) (per curiam) (characterizing as “futile exercise” and “unproductive activity” the granting of leave to file untimely *pro forma*—i.e., issueless—petitions), *pet. denied*, 23 M.J. 177 (C.M.A. 1986) (mem.).

⁶⁶Recent illustrations include United States v. Fair, 26 M.J. 49 (C.M.A. 1988) (mem.); United States v. Griffin, 26 M.J. 49 (C.M.A. 1988) (mem.); and United States v. Anderson, 26 M.J. 77 (C.M.A. 1988) (men.:) (2-1), in each of which the court specified

If, as the appellate outcomes indicate, good occasionally does come to appellants in specified-issue cases, what can be the harm of this process? The harm is elusive but not insubstantial. It has to do with the basic architecture of the system; why should we take a more paternalistic approach to appellate military justice than our society applies in other fields of appellate justice? In a sense, indeed, the issue is cousin to the recurring question whether the civilian rule should be applied on any particular issue of evidence or criminal procedure in the military. Are there reasons peculiar to the military that counsel a more intrusive role for the highest court of the jurisdiction? Does it follow that the Court of Military Appeals must be seen either as abandoning its impartiality or, in the alternative, as forcing the parties to engage in a frequently futile appellate exercise?⁶⁷

In the 1950's and early 1960's, an argument could have been made that there was a need for a judicial "helping hand" to establish the reality of appellate military justice on a firm footing and perhaps to ensure that command influence did not creep upward in the system to infect the quality of appellate representation. Perhaps there was a sense that the whole system was novel, and that the court might move the jurisprudence along faster if it could give pointers by means of specified issues. There probably was also a sense that it was important that civilians play some role in the review of any serious court-martial to assure servicemembers that they were not entirely at the mercy of appellate counsel who were themselves, in substance or appearance, part of "the system."

But these considerations have little or no force today. Command

an issue regarding total forfeitures when no confinement was adjudged, reduced the forfeitures to two-thirds pay, and otherwise affirmed. Judge Cox's laconic dissent in *Anderson* observed: "De minimis non curat lex."

⁶⁷The danger that specification of an issue will merely compel appellate defense counsel to embark on a legal wild goose chase cannot be discounted. *E.g.*, *United States v. Battles*, 25 M.J. 58, 59 (C.M.A. 1987) (aff'g after finding it unnecessary to reach specified issue); *United States v. Wirth*, 18 M.J. 214, 219 n.2 (C.M.A. 1984) (aff'g C.M.R. decision; unnecessary to reach specified issue); *United States v. Kelly*, 14 M.J. 196 (C.M.A. 1982) (reaching specified issue as to power to decide issues advanced by accused, but rejecting all seven such issues; C.M.R. decision aff'd); *United States v. Cosby*, 14 M.J. 3 (C.M.A. 1982) (per curiam) (aff'g after specifying issue as to instructional error; noting that "[a]bsent clear error, such objections do not survive on appeal") (citation omitted); *United States v. Jones*, 13 M.J. 407 (C.M.A. 1982) (per curiam) (aff'g after review of record showed no reasonably foreseeable testimony rendering prejudicial refusal to grant immunity to witness). *See also* *United States v. Woodrum*, 10 M.J. 329 (C.M.A. 1981) (mem.) (specified issue found meritorious: harmless error); *United States v. Moss*, 10 M.J. 329 (C.M.A. 1981) (mem.) (same). Where the court goes out of its way to raise an issue *sua sponte* under the "plain error" doctrine, only to simultaneously find the error nonprejudicial, *United States v. Paoni*, 19 M.J. 119 & n.* (C.M.A. 1984) (mem.), it is particularly difficult to perceive a reason for what amounts to a hollow exercise. This is true even when plenary briefs have not been filed.

influence would have been unlikely at the appellate level in any event, given the statutory requirement that appellate defense counsel be in the Offices of The Judge Advocate General⁶⁸ rather than under the supervision of line commanders. In *United States v. Arroyo*, the court implied that appellate defense counsel might be subject to “indirect or subtle pressures,” but disclaimed the implication “that any sort of command influence will prevent appellate defense counsel from performing their professional duty.”⁶⁹ What is more, by providing such counsel “with some protection against reprisals or harassment if they assert arguments that may not be well received by persons higher in the military establishment” (since counsel will be able to say they were “only doing their duty”), *Grostefon*⁷⁰ helps ensure that appellate defense counsel cast their net as broadly as is professionally responsible in assigning errors. Having itself been decided on an issue specified by the court,⁷¹ that case makes it that much less urgent that the court undertake its own search for error.

With nearly forty years of reported military decisions behind us, an established trial judiciary, and heavy reliance on lawyers throughout the system, it is hard to perceive a proper didactic role for specified issues on other than the rarest occasions. This is not to say that there is no further room for elaboration of military jurisprudence — heaven forbid!⁷²—but at a certain point it is fair to expect that the parts of the legal canvas that remain to be painted begin to diminish.

A further factor — although little attention has been paid to the subject — is the existence of professional responsibility machinery in each service’s legal program. If it functions properly, it can provide a disincentive to shoddy workmanship that might, one must assume, be the cause of some specified issues. On the other hand, there is not much that can be done to prevent burnout or the lack of face-to-face contact where the jurisdiction exists around the globe⁷³ but appeals are centralized. These may be fruitful areas for further attention by senior managers of military legal personnel.

But again, what harm is there if a few accused who would not otherwise do so occasionally get relief? The harm lies in the distor-

⁶⁸UCMJ art. 70(a).

⁶⁹17 M.J. 224, 226 (C.M.A. 1984) (2-1).

⁷⁰12 M.J. 431 (C.M.A. 1982); see also *United States v. Healy*, 26 M.J. 394, 397 (C.M.A. 1988). Incidentally, in *Healy* the only issue was one that the court specified. See 21 M.J. 300 (C.M.A. 1985)(mem.). The case was affirmed after nearly three years.

⁷¹This appears not from the order granting review, 11 M.J. 358 (C.M.A. 1981)(mem.), but from the opinion. 12 M.J. at 433.

⁷²*Cf. Huck v. Finn* (Calaveras Co., Cal., Super. Ct. 1984), discussed in *Meister*, *The Day the Common Law Stopped*, 71 A.B.A.J. 103 (1985).

⁷³UCMJ art. 5 (Code “applies in all places”).

tion of the judicial process. Emboldened by Congress's directive that the judges participate in the Code Committee,⁷⁴ the Court of Military Appeals may view itself as an ombudsman that operates according to a common law of article 67,⁷⁵ under which, for example, its members have an extensive field visitation program. That judges should occasionally get out of the courthouse cannot be denied. But the more the Court of Military Appeals does of this, the more it abandons its claim to be treated as if it were on a par with the other federal courts of appeals. Similarly, an appellate court cannot make itself the framer of issues as frequently as this court still does without creating the impression that it is doing something other than deciding the cases that the litigants bring.⁷⁶ Moreover, where a court forms the habit of specifying issues without first articulating its criteria for the grant of review, much less its criteria for specification, it debases its own institutional currency by making the discharge of its responsibilities seem to be a matter of fortuities rather than the application of known criteria to issues that the parties present.⁷⁷ As the Ninth Circuit has observed, "The commission of a judge is not a general assignment to go about doing good. There is work enough for courts to do, and time enough for a judge to act when a case is properly before the court."⁷⁸ Or, as Chief Judge Hodgson wrote in *United States v. Landes*, "The function of an appellate court is to review justiciable issues, and while we may be intellectually stimulated by an interesting academic

⁷⁴UCMJ art. 67(g).

⁷⁵See also *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

⁷⁶A troublesome illustration of this danger is *United States v. Hessler*, 5 M.J. 277 (C.M.A. 1978) (mem.), where the court, after deciding the case, 4 M.J. 303 (C.M.A. 1978), granted a petition for reconsideration on assigned issues and specified a further issue which, according to Judge Cook's dissent, 5 M.J. at 278, would not alter the court's decision.

⁷⁷A recent illustration of the essentially fortuitous nature of the specification process involves the efforts to obtain review of confinement conditions for military confinees at the Cumberland County, N.C., jail, near Fort Bragg. After repeated efforts to obtain a grant were rebuffed by the Court of Military Appeals, e.g., *United States v. McCallister*, 26 M.J. 171 (C.M.A. 1988) (mem.); *United States v. Secor*, 26 M.J. 44 (C.M.A. 1988) (mem.), the court specified the issue in a case in which it had not been raised. *United States v. Loman*, 26 M.J. 279 (C.M.A. 1988) (mem.).

⁷⁸*Jett v. Castaneda*. 578 F.2d 842, 845 (9th Cir. 1978).

Federal courts are not roving engines of justice careening about the land in search of wrongs to right. Rather, federal courts were designed to be much like all other courts: passive entities resolving only the quarrels which are properly put before them by interested parties and which are within the competence of courts in a tripartite system of constitutional government.

Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 461 (S.D. Fla. 1980), *modified on other grounds*. 676 F.2d 1023 (5th Cir. 1982).

question there is no need to address it when the issue is not preserved for appeal.”⁷⁹

The specification of issues has important and undesirable consequences for the court, the military appellate bench, and the bar. Repeated use of the power can be read as a public vote of no confidence in the military appellate bar’s ability to identify and frame issues creatively — certainly one of the key tasks of such counsel. It weakens the very adversary process the court has been at pains to protect” and frustrates the efforts of appellate counsel to select cases that may be the best vehicle for developing some new principle of law. As in other jurisdictions, the facts and the state of the record are likely to bear heavily on military doctrinal developments. It is one thing for an appellate court to await “the right case,” but quite another for it to seize the initiative and select as a vehicle a case that counsel thought unfit for the purpose. In addition to increasing the risk of doctrinal missteps and wasteful improvident grants, such a process encourages the view that the court may be pursuing an institutional agenda that trenches on prerogatives of the Congress and the President, rather than — or, perhaps, in addition to — simply dispensing justice.

Specification also creates needless complexities where, as in a series of recent cases, counsel find themselves under appellate attack for being tardy in filing supplements to petition for review that fail to identify any errors.⁸¹ If the court perpetuates its practice of specifying issues, it seems unfair to counsel and a waste of time to dwell on the timeliness of a supplement to the petition for review that in turn

⁷⁹17 M.J. 1092, 1093 (A.F.C.M.R.) (footnote and citations omitted), *pet. denied*, 19 M.J. 22 (C.M.A. 1984).

⁸⁰In several cases, for example, the court required the appointment of counsel for appellants who had affirmatively waived that right on appeal. *United States v. Prosper*, 7 M.J. 136 (C.M.A. 1979) (mem.) (2-1); *United States v. Frankenberger*, 7 M.J. 136 (C.M.A. 1979) (mem.) (2-1); *United States v. Lawson*, 4 M.J. 201 (C.M.A. 1978) (mem.) (2-1). Doing so aids the court in performing its judicial function, but leaves to the parties and counsel — or should — the duty to frame the issues.

⁸¹*See* *United States v. Ortiz*, 24 M.J. 323 (granting motion for leave to file petition Supplement), *pet. denied*, 25 M.J. 238 (C.M.A. 1987); *United States v. Bradshaw*, 24 M.J. 201 (C.M.A. 1987) (mem.) (denying motion for leave to file untimely supplement; noting guilty plea and absence of adequate explanation for lateness); *United States v. Aho*, 23 M.J. 171 (C.M.A. 1986) (mem.) (2-1) (Cox, J., in dissent, noting he would allow late petition supplements only on showing of excusable neglect and meritorious appeal); *United States v. Randolph*, 23 M.J. 171 (C.M.A. 1986) (mem.) (2-1). Of three cases in which the court required appellate defense counsel to orally argue motions for leave to file untimely petition supplements in *pro forma* cases, 24 M.J. 224-25, 335, two were denied plenary review. *United States v. Poole*, 25 M.J. 191 (C.M.A. 1987) (mem.); *United States v. Whitney*, 25 M.J. 167 (C.M.A. 1987) (mem.). In the third case an issue was specified, *United States v. Onart*, 25 M.J. 373 (C.M.A. 1987) (mem.), and ultimately the sentence was reversed with leave to reassess. 26 M.J. 315 (C.M.A. 1988) (mem.).

cites no issues. If the court's *sua sponte* review will occur in any event, submission of the petition for review should suffice to trigger the process.

Moreover, by implication, specification is a rebuke to the courts of military review, because it may mean they too failed to perceive issues either in the case as it reached them or in their own handling of the matter or statement of their own *ratio decidendi*.

But let us assume that the issues specified by the Court of Military Appeals are proper ones — that each and every one of them, had they been raised in a petition for review, would have received a grant. If such issues are not being raised by the parties, does this mean that the workmanship or energy level of appellate counsel is not what it should be? If so, one would think the answer is not to keep specifying issues (which is merely treating the symptom), but rather to address the source of the problem. One would think that an announcement by the court that it will no longer specify issues except where they qualify under the exacting standard for “plain error”⁸² would cause appellate counsel to conclude that they will be looked to more than in the past to exercise the highest degree of care in ensuring that they fashion, preserve, frame, and argue meritorious issues effectively.⁸³

Finally, a word about “trailer cases,” which form a large fraction of the total of cases in which the court has specified issues. To the extent that specified issues are present in other cases in which an issue has either been granted or specified, how concerned should we be that kicking the specification habit will lead to substantively unjust results because similarly situated litigants will not receive similar treatment?

This is a not insubstantial objection, but neither is it a compelling justification for the current state of affairs. To be sure, there is unfairness in the case selection process where a decision may be afforded retroactive effect only as to cases that are still in the appellate process.⁸⁴ In the nature of things, a litigant who does not raise a par-

⁸²See, e.g., *United States v. Paoni*, 19 M.J. 119 n.* (C.M.A. 1984)(mem.) (“in the interests of judicial economy we will notice plain error even when the specific issue has not been granted”); *Specification of Issues*, *supra* note 6, at 118 (“for a case containing plain error, the specified issue is not only a proper tool, but advanced the cause of efficient judicial administration”).

⁸³*Cf.* *United States v. Ortiz*, 24 M.J. 323,325 (C.M.A. 1987)(cautioning that flagrant or repeated disregard of rules will lead to sanctions, including suspension or disbarment).

⁸⁴The court's effort to identify potential trailer cases in which issues should be specified sometimes leads it to reach back to cases that have been closed, or that have lain

ticular issue has no reasonable expectation of relief, or even of a grant of plenary review, as to that issue. To this extent, where a case is made a trailer case through the specification process, no subjective expectation of the accused is being vindicated, and to the extent that specification is withheld, the court merely denies the litigant a kind of appellate windfall.

Will Seaman Recruit Smith be angry — will his esteem for the fundamental fairness of the military justice system decline — when he finds out that Jones, the chap in the next cell, is to be released, or at least obtains a *DuBay*⁸⁵ hearing, on an issue Smith could also have raised? Perhaps so, but it is difficult to see what it is *in the military justice system* that requires Smith to be treated more generously than, say, Berkowitz, an inmate in the civilian federal prison, whose counsel failed to raise an issue successfully asserted on behalf of another inmate in the same civilian prison.

V. ALTERNATIVES TO THE JUDICIAL SEARCH FOR ERROR

If there are significant institutional costs to the practice of specifying issues on a regular basis, it would seem that alternatives exist that do not suffer from those costs. They involve some creativity on the part of the court and appellate counsel, but not much extra work. Here are some examples:

A. As we blunder even deeper into the Computer Age, the appellate counsel offices—all of which regularly employ computers for word processing—could explore the use of software to organize and retrieve issues so as to facilitate tracking through the Petition and

dormant for a long while on the merits docket. For example, in *United States v. Caraballo*, 23 M.J. 421 (C.M.A. 1987) (mem.), the court specified an issue in a case in which it had granted review over a year and one-half earlier, apparently because it had, in the interval, become interested in the fifth amendment implications of so-called “show-and-tell” regulations. *See also* *United States v. Hessler*, 5 M.J. 277, 278 (C.M.A. 1978) (mem.) (Cook, J., dissenting) (issue specified on petition for reconsideration in case before the court for more than two years). In *United States v. Battles*, 23 M.J. 222 (C.M.A. 1986) (mem.), the court reached back a fortnight to vacate its denial of a petition for review and granted one issue and specified another. In *United States v. McCullough*, 16 M.J. 93 (C.M.A. 1983) (mem.), it reached back to reopen a case in which it had denied review three months earlier, noting that at the time of the initial denial it had already granted review of an issue relating to the validity of the court of military review panel’s composition. *See also* *United States v. Bass*, 17 M.J. 323 & n.* (C.M.A. 1984) (mem.) (vacating week-old denial of petition and specifying issue); *United States v. Mattingly*, 17 M.J. 313 n.* (C.M.A. 1984) (mem.) (vacating five-day-old denial of petition for review).

⁸⁵*United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Master Dockets of the Court of Military Appeals. It might be well to look into the feasibility of a master tracking system so that the history and evolution of any particular issue — asserted by counsel, identified under *Grostefon*, or specified — could be followed and made a key ingredient of the appellate briefing and strategy process. Of course, this can also be done manually or by regular staff conferences, but how much easier and more nearly foolproof if computers are harnessed?⁸⁶

B. The appellate counsel offices could arrange regular meetings on an inter-service basis to ensure that counsel coordinate strategies from one service to another. Such meetings have been conducted in the past on specific issues, such as the death penalty case⁸⁷ and *Solorio u. United States*, but one wonders whether they should be made a more regular part of the process. If so, they would probably make it easy for the appellate counsel to spot and raise by petition issues that might otherwise not surface except through the specification process.

C. Is there a place for a National Institute of Military Justice, either inside the government or in the “public interest” portion of the private sector?⁸⁸ Given that the appellate counsel offices are likely to be stretched thin with the need to keep up with granted cases and the all-too-rarely rewarded task of seeking writs of certiorari, the kind of longer-range planning necessary to identify and frame issues that might otherwise wind up being specified by the court might be one function in which such an institute could play a useful role.

D. The court’s annual Homer Ferguson Conference should include presentations more specifically geared to the identification of issues

“This particular suggestion could be facilitated if the court — should it determine to adhere to its policy on specification of issues — were to make more general its now-occasional practice of indicating in the order specifying the issue the cases or other authority it suspects may bear on the matter, *e.g.*, *United States v. Griffith*, 25 M.J. 217 (C.M.A.1987)(mem.) (referenceto Fed. R. Crim. P.29); *United States v. Paulo*, 23 M.J. 358 (C.M.A. 1987) (mem.); *United States v. Mileham*, 23 M.J. 358 (C.M.A. 1987) (mem.); *United States v. Clark*, 23 M.J. 266 (C.M.A.1986) (mem.); *United States v. McCrae*, 15 M.J. 93 (C.M.A.1983) (mem.) (citing law dictionaries, Am.Jur.2d, and state, federal, and military cases); or some pending case to which the one at bar seems to be a candidate for trailer status. *E.g.*, *United States v. Gilliom*, 23 M.J. 349 (C.M.A. 1987)(mem.); *United States v. Bozan*, 22 M.J. 340 n.1 (C.M.A.1986) (mem.); *United States v. Jarvis*, 22 M.J. 271 (C.M.A. 1986)(mem.); *United States v. Cleveland*, 22 M.J. 187 (C.M.A.1986) (mem.). Furnishing this information also serves a useful purpose by reducing guesswork when the court’s simultaneously specifies an issue and summarily remands. *E.g.*, *United States v. Joyner*, 25 M.J. 257 (C.M.A.1987) (mem.).

⁸⁷*United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983).

⁸⁸A variety of models could be considered. For example, in 1984 Congress established a State Justice Institute. 42 U.S.C. §§ 10701-13 (Supp. IV 1986). Others include the Vera Institute of Justice, which has conducted pioneering criminal justice-related projects, and the Academy for State and Local Government’s State and Local Legal Center. See generally Bloch & Benjamin, *The State and Local Legal Center at Five — A Few Thoughts*, 20 Urb. Law. 233 (1988).

that could end up being specified. If nothing else, perhaps the court could be persuaded to permit its Central Legal Staff to give a report on its current “marching orders” from the judges, in order to remove at least some of the guesswork from appellate counsel’s job and allow counsel to lead the target rather than having to wait for some new surprise from E Street. Even if the court were loath to show too much of its hand as to the staff’s instructions, a useful and time-saving step would be to make available to the services and the bar in general the staff’s “Issues Index,” showing all granted issues in pending cases.⁸⁹

E. The judges of the court might wish to consider conducting formal “conferences,” like those held by the Supreme Court, when deciding whether to grant review. Actually meeting, rather than merely voting by notation, might permit the court’s standards for both grants and specification of issues to be sharpened and reduce some of the sense that the process is largely idiosyncratic or fortuitous.

F. If the judges are concerned that their ability to perform their supervisory role would be reduced if they abandoned the regular specification of issues, perhaps they would be disposed to adopt a one-judge grant rule, under which the court has operated at various times in its history. The advantage of this change would be that it would permit the court to address issues that might currently elude review, while strengthening the adversarial process. Public confidence in the system should be unaffected, while legislative and bar confidence would be strengthened by bringing it more closely into step with generally accepted norms of appellate procedure. An issue sufficiently cogent that counsel briefs it and one judge deems it worthy of plenary consideration by his or her fellows is an issue that should be heard. The court’s time would be better spent in this fashion than in pursuing most of the issues currently being specified. The court could also consider requiring one vote to grant review on an issue stated by the petitioner but two votes to specify an issue. Because granted issues would increase and thereby demand a larger share of the court’s limited time, it is likely that as a matter of allocating resources specification would further taper off under such a rule.

VI. IS THERE A PROPER ROLE FOR THE CENTRAL LEGAL STAFF?

The court has been praised for its creativity in establishing a Central Legal Staff.⁹⁰ The staff and its functions are inextricably linked

⁸⁹The former name for the Issues Index was “grant sheet.” See Staff and Process, *supra* note 17, at 219-20.

⁹⁰*Id.* at 17, 222 (C.M.A. as American innovator; noting prior use of central staff by English Court of Criminal Appeal).

to the policy of specifying errors. If, as this paper suggests, that policy should be altered, what should become of the staff?

There is a proper role for the Central Legal Staff, but it finds its model not in the practice of the Court of Military Appeals, but in that of the Court of Appeals for the District of Columbia Circuit,⁹¹ the District of Columbia Court of Appeals and the numerous other appellate courts that rely on central staffs for the disposition of motions and other matters in cases diverted from the process of plenary briefing and argument.

One approach would be to reduce the size of the staff through normal attrition or transfers, as the judges move toward the norm of rotating law clerks drawn from the ranks of recent law graduates. It might be wise, given the specialized nature of the court's work, for each chambers to have one law clerk fresh from law school and another with recent military legal experience, with the customary terms of one or two years. If clerks serving more than a year are desired, their terms should be staggered to provide continuity of office procedure. The remaining members of the staff could profitably be made "motions clerks" like those employed by the District of Columbia Circuit. Such an arrangement would make even more sense if, as the Department of Defense has continued to advise," the court is expanded to five judges, since that would permit creation of a "Motions Panel" with rotating membership.

VII. IMPLICATIONS OF THE SEARCH FOR ERROR ON THE QUESTION OF ARTICLE III STATUS

Because serious attention is being given to the notion of making the Court of Military Appeals an article III tribunal, it is appropriate to consider what such a shift might imply for the specification of issues.

There are certainly good things to be said about article III status: life tenure, protection against diminution in pay, and the ability to sit elsewhere (reducing the risk of burnout from a steady diet of military cases arising under a single Act of Congress) and have others sit by designation.

A change to article III status would remove any question about

⁹¹See D.C. Cir., *Handbook of Practice and Internal Procedures* 3 (1987).

⁹²See Garrett, *Reflections on Contemporary Sources of Military Law*, *The Army Lawyer*, February 1987, at 38, 41

limiting the court's functions to the resolution of cases and controversies. As a practical matter, the court already applies such a criterion. It will not, for example, decide certified cases where the question framed is *academic*.⁹³ Criminal appeals are certainly cases or controversies within the meaning of article 111, but one cannot help but feel a certain tension between that constitutional standard and the practice of regularly specifying issues beyond the narrow bounds of the "plain error" doctrine. The more a court does of this, the less it looks like the passive arbiter that is the model of the judicial function.

This is not to say that the Court of Military Appeals should content itself with being merely the proverbial "umpire blandly calling balls and strikes for the adversaries appearing before it."⁹⁴ But coupled with the responsibilities that Congress imposed (such as the duty to participate in the Code Committee) or taken on as a matter of custom (such as the field visiting program),⁹⁵ the habit of specifying issues—whatever one may think of it while the court has only article I upon which to rest—would strike a discordant note under article 111.

It is also worth considering the effect of specification of issues on the availability of review in the Supreme Court. The grant of review on any issue renders the entire case subject to further review on writ

⁹³H. Moyer, *Justice and the Military* § 2-794, at 635 (1972) (citing *United States v. Aletky*, 37 C.M.R. 156 (C.M.A. 1957)); *United States v. Kelly*, 14 M.J. 196, 200 & n.5 (C.M.A. 1982) (Everett, C.J.) (C.M.R. having given the very relief sought by both sides, "the absence of suitable occasion to answer the certified question is especially evident").

⁹⁴*Cf.* *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁹⁵This literal aspect of the court's "roving commission" warrants further thought. The visitation program has been defended on the basis that it helps "remind military personnel at every level that the military justice system is subject to civilian control" and "helps provide the judges with a better understanding of the military society." Everett, *supra* note 4, at 34. On the other hand, if, as has been suggested, *id.* at 34 & nn.35-37, Congress requires, in moving to an article III regime for the court, that new or replacement judges be familiar with military law and society, the need for the visitation program would be reduced. The utility of personal visits to far-flung bases and stations to "show the flag" of civilian control is also open to question since there already exist ample means of communicating the same message (through the reported cases and press coverage thereof) and because any visit represents time lost from the process of judging, which is, after all, the main event. Certainly what might be called the educational function of visitation could be properly served—and the need to avoid the appearance of *ex parte* influences on the judges better honored, *see* *United States v. Torres*, 7 M.J. 102, 107 (C.M.A. 1979) (Cook, J., concurring) (personal observations led to conclusion that some services "are experiencing great difficulty in complying with" earlier ruling of court)—by effective briefing and building of the record at trial, as is customary in the common law tradition.

of certiorari.⁹⁶ Hence, when the Court of Military Appeals specifies an issue it opens the Supreme Court to a case the lower court did not otherwise think worthy of eligibility for certiorari.⁹⁷ The extraordinary limits Congress placed on military accuseds' access to the Supreme Court are regrettable, but given that legislative judgment, and the unlikelihood that the Supreme Court will be impressed by an issue of which appellate defense counsel was so uncertain or unaware that it emerged only when specified by the Court of Military Appeals, one might still wonder whether the latter court has properly analyzed the certiorari eligibility implications as a reason for exercising restraint in the specification of issues.

Whether or not Congress can fairly be said to have affirmatively approved the tradition of specifying issues,⁹⁸ if the proposals for article III status proceed, care should be taken to determine the legislature's intent concerning the perpetuation of that tradition.

VIII. CONCLUSION

The data suggest that the practice of specifying issues not advanced by a litigant is, except for a little shrinkage in the area of late filings, alive and well on E Street. Given what the court itself has recognized

⁹⁶The legislative history of 28 U.S.C. § 1259 (Supp. IV 1986) makes this clear. *Supreme Court Review*, *supra* note 18, at 6002 & n.11. Section 1259 gives the Supreme Court jurisdiction over "decisions" of the Court of Military Appeals in "cases" reviewed under article 67(b)(3). An earlier Administration proposal would have confined the certiorari jurisdiction to "issues" of which review had been granted. H.R. 6298, § 4(a), 96th Cong., 2d Sess. (1980), reproduced in *Hearings on H. R. 6406 and 6298: Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process Before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, No. 96-55, 96th Cong., 2d Sess. 39 (1980). The House eschewed the "issues" approach, and passed a bill employing the broader "cases" phraseology, H.R. 8188, 96th Cong., 2d Sess., passed. 126 Cong. Rec. H10340-42 (daily ed. Oct. 2, 1980), which was carried over in the measure that became § 1259. Use of the broader term in the version enacted compels an inference that Congress intended to permit Supreme Court review of any issue raised in the Court of Military Appeals, provided that court granted review on some issue. The provision has been universally so understood, although the Supreme Court has to date not granted certiorari on any issue not granted by the Court of Military Appeals.

⁹⁷Thus, in *United States v. Stephenson*, 21 M.J. 110 (C.M.A. 1985) (mem.), the court specified an issue of statutory interpretation that it had resolved six years earlier (before direct Supreme Court review was authorized), apparently for the purpose of affording the appellant an opportunity to have the prior holding examined by the Supreme Court. No certiorari petition was filed. *Cf. United States v. Johnson*, 26 M.J. 222 (C.M.A. 1988) (mem.) (granting review as to five-member nonunanimous court-martial, and summarily affirming). *petition for cert. filed*, 56 U.S.L.W. 3851 (U.S. June 3, 1988) (No. 87-1983).

⁹⁸*United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987) (noting absence of congressional complaint that court is "too generous with appellate review"). Since 1980 the court has made a point of noting the percentage of specified issues in a footnote to its annual report to Congress, but it seems improbable that either of the Committees on Armed Services actually focused on the matter as a result.

as its limited practical utility in *pro forma* cases in particular," specification represents a diversion of finite appellate counsel resources just when those resources are being spread thin because of new obligations arising from the extension of the Supreme Court's certiorari jurisdiction to military cases.¹⁰⁰

Even discounting specification that only reframes issues advanced by the petitioner, specification on the scale still practiced by the Court of Military Appeals is at odds with the norm of appellate judicial administration in the United States, and represents a holdover from an earlier age when the military justice system was substantially less reliant on lawyers than it has been since the 1960's. As Judge Cook observed in *United States v. Banks*, "[w]hen a rule has outlived its purpose or experience demonstrates it is seriously flawed in operation, it should be vitiated or altered, as the situation requires."¹⁰¹ So it is with the court's practice regarding the specification of issues.

On balance, the arguments in favor of the regular specification of issues are unpersuasive, while, on the other side of the ledger, the practice erodes the court's institutional position by taking it out of the relatively passive role properly demanded of appellate tribunals in our adversarial system of justice. Lacking, as it does, many of the other sources of strength and legitimacy from which other supreme courts benefit," the Court of Military Appeals would be well-advised to further reduce its specification of issues until it more closely approximates the prevailing standards for plain error and waiver in criminal appeals where the accused is represented by lawyer counsel.¹⁰³ In doing so it should stress to the appellate military bar the institutional and professional implications of such an evolution. It will then be in a position to refocus the work of its Central Legal Staff in ways that will contribute more appropriately to the administration of justice in the many cases that are properly before the court in a defense showing of "good cause." Failing to do so, on the other hand, could furnish an impediment to congressional action to elevate the court to article III status.

⁹⁹*United States v. Sumpter*, 22 M.J. 33, 34 (C.M.A.) (per curiam), *pet. denied*, 23 M.J. 177 (C.M.A. 1986) (mem.).

¹⁰⁰UCMJ art. 70(c).

¹⁰¹7 M.J. 92, 94 (C.M.A. 1979) (Cook, J., concurring).

¹⁰²See *Tree in Forest*, *supra* note 6, at 9 n.5.

¹⁰³See *Mil. R. Evid. 103(d)*, discussed in S. Saltzburg, L. Schinasi & D. Schlueter, *supra* note 25, at 17-18, 24-26.

APPENDIX

ISSUES SPECIFIED DURING 1986-87

<i>Case</i>	Grant	<i>Issue</i>	<i>Outcome</i>
Graves	22:184	Multipliciousness	Aff'd 23:245
Cleveland	22:187	Sufficiency of evidence (<i>semble</i>)	Aff'd 22:361
Hill	22:242	Providence (aider and abettor, bought marijuana for own use)	Aff'd 25:411
Jarvis	22:271	Inferences and burden of proof (stolen property)	Abated (death) 23:359
Booker	22:337	Prejudice from MJ's answers to members' questions	Aff'd 25:114
Schlote	22:337	Need for specific prej in command influence cases	Aff'd 23:155
Lewicki	22:337	Confrontation Clause (victim's statements to mother)	Aff'd 26:63
Payton	22:338	(1) attorney-client privilege (SOFA) (2) waiver of breach of privilege	Set aside/ remand for DuBay 23:379
Clark	22:338	(1) attorney-client privilege (SOFA) (2) waiver of breach of privilege	Set aside! remand for DuBay 24:127
Spurgeon	22:338	(1) attorney-client privilege (SOFA) (2) waiver of breach of privilege	Set aside/ remand for DuBay 24:127
Markowich	22:339	(1) attorney-client privilege (SOFA) (2) waiver of breach of privilege	Set aside/ remand for DuBay 24:127

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SPECIFIED ISSUES

<i>Case</i>	<i>Grant</i>	<i>Issue</i>	<i>Outcome</i>
Rice	22:344	(1) use of MJ post-trial testimony to impeach sentence (2) req for bench trial affected by misunderstanding (3) pretrial negotiations affected by misunderstanding	Aff'd 25:35
Baker	22:345	Sufficiency of evidence (homicide)	Aff'd 24:354
Bonds	22:355	Need for specific prej in command influence cases	Aff'd 23:153
Ware	22:355	Need for specific prej in command influence cases	Aff'd 23:155
Shepherd	22:357	Need for specific prej in command influence cases	Aff'd 23:155
Moroughan	22:361	Need for specific prej in command influence cases	Aff'd 23:155
Garrison	22:364	Multipliciousness	Rev'd in part/ sentence aff'd 26:216
Anderson	22:366	Need for specific prej in command influence cases	Rev'd & remanded 25:162
Olson	22:367	Did gov't comply with pretrial?	Fine set aside 25:293
Tillman	22:421	Failure to question accused re pretrial waiving members and Art 32 hearing	Aff'd 24:209
Gilbert	22:421	ROK "show-and-tell"	Set asidel remand 26:167

<i>Case</i>	<i>Grant</i>	<i>Issue</i>	<i>Outcome</i>
Allen	22:425	Accused opportunity to lay foundation for polygraph evid	Aff'd 24:450
Defibaugh	23:53	Need for specific prej in command influence cases	Findings modified: aff'd 23:180
Yeoman	23:63	Admissibility of MP report as business record under MRE 803(8)	Aff'd 25:1
Arruza	23:176	Allowing witness to testify to prior sexual encounters between accused and victim	Aff'd 26:234
Harpst	23:185	Multipliciousness	Aff'd 24:436
Battles	23:222	Effect of operational needs of vessels at sea on admissibility under MRE 313	Aff'd 25:58
Marrow	23:230	Providence of plea	Aff'd 24:214
Plummer	23:253	Pretrial requiring waiver of members and motions	Aff'd 24:214
Coates	23:253	Pretrial requiring waiver of members	Aff'd 24:214
Thomson	23:255	Pretrial requiring waiver of members	Aff'd 23:255
Brandkamp	23:260	"Exculpatory no"	Aff'd 24:454
Marble	23:265	Sufficiency of urinalysis evidence	Aff'd 24:127
Williams	23:266	"Exculpatory no"	Aff'd 24:453

19881**SPECIFIED ISSUES**

<i>Case</i>	<i>Grant</i>	<i>Issue</i>	<i>Outcome</i>
Clark	23:266	Failure to question accused re pretrial waiving members	Aff'd 24:217
McConnell	23:271	Sufficiency of evidence (cocaine)	Aff'd 24:127
Diggs	23:289	Failure to question accused re pretrial waiving members	Aff'd 24:220
Santos	23:289	Validity of pretrial waiving members	Aff'd 24:216
Hanson	23:349	(1) removal of DC (2) chill of DC by MJ	Aff'd 24:377
Gilliom	23:349	Admission of article on effects of cocaine	Aff'd 24:200
Paulo	23:358	Failure to question accused re pretrial waiving members	Aff'd 24:217
Mileham	23:358	Failure to question accused re pretrial waiving members	Aff'd 24:217
Simpkins	23:398	CMR affirmance without regard to factual sufficiency or evaluation of witness credibility	Aff'd 24:49
Hamilton	23:402	Sufficiency of urinalysis evidence	Aff'd 24:129
cox	23:402	Sufficiency of urinalysis evidence	Aff'd 24:127
Valencia	23:402	Failure to question accused re pretrial waiving members	Aff'd 24:217
Smith	23:406	Failure to question accused re pretrial waiving members	Aff'd 24:217

<i>Case</i>	<i>Grant</i>	<i>Issue</i>	<i>Outcome</i>
Turner	23:406	CMR affirmance without regard to factual sufficiency or eval of witness credibility	Set aside/ remand 25:324
Lalley	23:408	Failure to question accused re pretrial waiving members	Aff'd 24:216
Carter	23:414	Unobjected-to CID evidence of post-traumatic symptoms in rape case	Aff'd 26:428
Goings	23:415	Failure to question accused re pretrial waiving members	Aff'd 24:220
Levite	23:416	(1) Can non-CA violate Art 37 by impeding CM under Art 98 or violating accused's right to gather evidence under Art 46? (2) If so, must prej be shown?	Rev'd 25:334
Gardner	23:416	Failure to question accused re pretrial waiving members	Aff'd 24:222
Bankston	23:418	CMR use of improper standard in reasonable doubt case	Set aside, remand 26:82
Caraballo	23:421	ROK "show-and-tell"	Rev'd/ remand (reassess sentence) 26:216
Owens	24:53	Multipliciousness	Rev'd remand (reassess sentence) 25:221
McCoy	24:54	Providence of plea	Aff'd 25:443

19881**SPECIFIED ISSUES**

<i>Case</i>	<i>Grant</i>	<i>Issue</i>	<i>Outcome</i>
Laughlin	24:56	“Exculpatory no”	Aff’d 25:165
Mora	24:58	Rereferral under same convening order after mistrial	Aff’d 26:122
Eskins	24:61	Providence of plea	Aff’d 24:220
Mercer	24:63	Sufficiency of urinalysis evidence	Rev’d, rehearing allowed 25:160
Varela	24:126	Compliance with MRE 103(a)(2)	Rev’d & remanded 25:29
Hobart	24:126	Multipliciousness	Modified/ aff’d 24:428
Bresemann	24:326	MJ error in admitting documents	Aff’d 26:398
Saavedra	24:233	Providence of plea (accused denies key fact)	Aff’d 25:165
Harter	24:234	Providence of plea (accused denies key fact)	Aff’d 25:165
Quillen	24:400	Tempia/Art 31—statements to PX store detective	
Hoff	24:400	(1) does misprision of offense violate Art 134? (2) sufficiency of evid (3) constitutionality of Navy Reg art 1139	Modified/ aff’d 27:70
Bono	24:442	Effective assistance of counsel	Aff’d 26:240
Taylor	25:156	Multipliciousness	Set aside 26:7

<i>Case</i>	<i>Grant</i>	<i>Issue</i>	<i>Outcome</i>
Hilton	25:206	“Show-and-tell”	Set asidel remand 26:165
Griffith	25:217	MJ power to enter <i>sua sponte</i> judgment of acquittal	Aff’d 27:42
Ray	25:219	(1) MJ allowing TC to reopen case after defense rests (2) was TC’s new evidence more prejudicial than probative?	Aff’d 26:468
Boyd	25:222	Multipliciousness	Ch/sp dismiss Sent aff’d 25:222
South	25:226	Civ DC’s conflict of interest	Aff’d 26:42
Holman	25:227	ROK “show-and-tell”	Rev’d/ chs dismiss 26:216
Bizzell	25:249	CMR standard for sentence review	Set asidel remand 25:250-51
Joyner	25:257	CA disqualified as to sentence	Set asidel remand 25:257
Onart	25:373	Instructional error re relative severity of fines/forfs v. CHL	Sentence rev’d 26:315

SELF-DETERMINATION AND U.S. SUPPORT OF INSURGENTS: A POLICY-ANALYSIS MODEL

by Captain Benjamin P. Dean*

I. INTRODUCTION

Intervention in support of insurgents and national liberation movements is one of the most difficult and controversial areas of concern both in international law and U.S. national policy. It is an area that has enormous impact on those subjects that matter most to nations: international stability and world order, national security, and the self-determination of peoples. The significance of this broad issue requires care, but also a sense of urgency in seeking solutions, both within the international community and in our own national policy. For any state actually involved, either as one that decides to intervene or as one that becomes an unwilling host of the insurgents, the insurgency issue becomes all the more critical.

Recognizing that the specific issue of support of insurgents involves a broad spectrum of larger political, legal, and security issues is only a first step. Then come questions that at first glance appear simple, such as: What labels fit here? Should we become involved? And will our involvement help or just make matters worse? The determination of whether a state has intervened illegally in a purely internal struggle depends mainly on the facts arising out of an inherently volatile environment. The issue also runs headlong into differing interpretations of the basic principles of traditional rules of international law.

The number of ongoing regional conflicts and the degree of media attention given them reflect a clear indication of the difficulty of dealing with external support of insurgents, and particularly, support of insurgents by the United States. The list of insurgencies itself proves the geographic scope of the issue. Heated dialogues on support of reb-

*Captain, Judge Advocate General's Corps. Presently assigned to Litigation Division, Office of The Judge Advocate General. Formerly assigned as Trial Counsel and as Chief, Legal Assistance, 1st Cavalry Division, Fort Hood, Texas, 1984-87; served as Field Artillery officer from 1977-81. **B.A.**, Univ. of North Carolina, Chapel Hill, 1977; **J.D.**, Univ. of North Carolina, Chapel Hill, 1984; **LL.M.**, The Judge Advocate General's School, 1988. Author of *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 Mil. L. Rev. 219 (1984). Member of the bar of North Carolina. This article is based upon a thesis submitted in partial satisfaction of the requirements of the 36th Judge Advocate Officer Graduate Course.

els in Afghanistan, Nicaragua, Angola, Mozambique, and Cambodia are daily reading fare.

What is it then that causes support of “freedom fighters” and “wars of national liberation” to be such emotional issues? Certainly part of the answer lies in how often such highly charged labels are loosely attached to suit the occasion. Yet, it is precisely because these terms strive to capture genuine aspirations of people seeking peace and freedom that persons are often in sympathy with the struggle and its ideals. Just beneath the surface of all insurgency issues runs this undercurrent of concern for the human condition. This concern for basic human rights compounds the complexity of dealing with insurgency.

The problems relating to insurgency and self-determination, together, are especially intractable, not only because of the emotions they evoke, but also because of the sheer pervasiveness of their impact. They interrelate in a way that exerts stress at every major level of public international law, foreign policy making, and national security planning. At one level, these issues cause divisions within the international legal structure as it seeks to restrict the use of force against the sovereignty of states, while protecting the fundamental human rights of individuals. At a second level, they are an independent cause of political instability and regional conflicts having the potential, ultimately, to threaten the existing global balance of power. Thirdly, insurgency and self-determination are a source of tension between the constraints imposed by traditional principles of international law on nonintervention and the wide-reaching objectives of the national foreign policy process. Finally, they are also no less a source of contention even within our own constitutional separation of powers, as demonstrated between the Chief Executive and Congress.

This article presents a policy-oriented analysis that examines self-determination and fundamental rights in the context of support for insurgents. The policy-oriented analysis that is the focus here is one part of a three-tiered contextual methodology. The methodology was developed by Professors McDougal, Lasswell, and Reisman and also includes both comprehensive case and legal trend analyses.⁷ This article first reviews trends in the sources of international law, world policy doctrines, and the national foreign policy debate that manifest an increasing support for individuals and peoples engaged in self-determination through insurgency. The article next examines current American doctrine on support of insurgents. Then, a policy analysis

⁷McDougal, Lasswell, & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 1 (1968).

will suggest a model approach to national decision making that directly addresses international law, including the human rights principles that are undercurrents of United States foreign policy on support of insurgents.

11. INTERNATIONAL LAW ON THE SUPPORT OF INSURGENTS

A. U.N. CHARTER GENERAL PRINCIPLES APPLICABLE TO INSURGENCIES

The Charter of the United Nations enshrines two great principles that have special significance for the issue of external support of insurgents. One is the principle of respect for human rights and the self-determination of peoples. The other is that of nonintervention and the suppression of aggression against nations.⁷ Whether support of insurgency is either permissible or desirable in any particular situation ultimately will depend upon the relative weights one accords these principles. In light of the Charter's stated purposes, these two principles were designed to be mutually reinforcing. In the context of insurgencies and national liberation movements, striking the balance between these has become a continuing source of controversy within the international legal community.

1. Respect for Human Rights and the Self-Determination of Peoples

The international legal system has recognized a body of law on individual human rights and fundamental freedoms that almost immediately began to break down the distinction between a state's

²U.N. Charter art. 1. Article 1 provides four purposes of the United Nations Charter:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

treatment of its own nationals, as opposed to the treatment of the nationals of another state within a state's own borders.³ The substance of human rights and the right of self-determination has taken shape in the U.N. Charter, as well as numerous other general and regional instruments defining and recognizing these rights and freedoms as part of international law.⁴

The Charter's principles of ensuring equal rights and self-determination of peoples and of promoting human rights and fundamental freedoms of individuals clearly reflect the U.N.'s broad purpose of maintaining international peace and security through conformity with international law.⁵ Article 55 expressly seeks, through these protections, to enhance "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."⁶ Article 56 commits all members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."⁷ A brief discussion of the development of basic human rights in international law will assist in one's understanding of how self-determination relates to nonintervention.

a. U.N. Resolutions and International Declarations on Self-Determination and Human Rights

General Assembly Resolution **2625**, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation

³Garcia-Amador, *Violations of Human Rights and International Responsibility*. First Report on International Responsibility, 1956, U.N. Doc. A/CN.4/96 (1956), reprinted in 2 Y.B. Int'l L. Comm'n 173, 193-203.

One view of human rights considers them as the "natural rights of mankind" based on fundamental regard for human nature and individual dignity. See, e.g., Donnelly, *Human Rights as National Rights*, 4 Human Rights Q. 391 (1982). Another perspective regards human rights to be based on a social justice concept of allocating society's benefits and burdens through its institutions. See, e.g., Beitz, *Human Rights and Social Justice*, in *Human Rights and U.S. Foreign Policy* 59 (P. Brown & D. MacLean eds. 1979).

⁴See generally I. Brownlie, *Principles of Public International Law* 552-99 (1979); A. Cristescu, *The Right of Self-Determination* (1981); L. Henkin, *The Rights of Man Today* (1978); H. Lauterpacht, *International Law and Human Rights* (1973); A. Rigo Sureda, *The Evolution of the Right of Self-Determination* (1973); L. Sohn & T. Buergenthal, *The International Protection of Human Rights* (1973); D'Amato, *International Human Rights at the Close of the Twentieth Century*. 22 Int'l Law 167 (1988); Weston, Lukes & Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 Vand. J. Transnat'l L. 585 (1987).

⁵See U.N. Charter art. 1.

⁶U.N. Charter art. 55.

⁷U.N. Charter art. 56. The Charter also refers to the need to protect human rights in the Preamble and in Articles 13(1), 62(2), 68, and 76(c).

Among States in Accordance with the Charter of the United Nations,' is one of the most authoritative statements on the Charter principles of self-determination and human rights. Resolution 2625 defines self-determination as the right of all peoples "freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development" and imposes on states the affirmative duty to refrain from any forcible deprivation of that right.⁹ In opposing or resisting the deprivation of fundamental rights by a state, peoples "are entitled to seek and receive support in accordance with the purposes and principles of the Charter under the Resolution."¹⁰

Resolution 2625 provides some limited operational guidance in this area by imposing on states a responsibility "to promote through joint and separate action" those rights and freedoms to which peoples are entitled.¹¹ The resolution also admonishes states that they must respect the territorial integrity and political independence of states that are in compliance with the Resolution and must refrain from disrupting the national unity or territorial integrity of any state. The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case.¹² Taken together, these

⁸G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter *The Declaration on Friendly Relations and Co-operation Among States*].

The first resolution that recognized the right of self-determination as a fundamental human right was the Declaration on the Granting of Independence to Colonial Countries and Territories, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A.4683 (1961).

⁹Resolution 2625, while reaffirming the fundamental principles of state sovereignty stated in the U.N. Charter, imposes on every state "the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."

¹⁰The Declaration on Friendly Relations and Co-operation Among States, *supra* note 8. These affirmative obligations of states to refrain from forcibly depriving peoples of the right to self-determination and to permit peoples to receive support in their struggle for freedom are particularly important because of what Professor Reisman refers to as their "operational implications." Resolution 2625, he observes, was a significant codification of contemporary international law that has become widely accepted. See Reisman, *The Resistance in Afghanistan is Engaged in a War of National Liberation*, 81 Am. J. Int'l L. 906, 908 (1987).

The affirmative obligations on states concerning self-determination may be said to extend to all states as part of customary law. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 1971 I.C.J. 16, 76 (Advisory Opinion) (Ammoun, separate opinion).

¹¹The Declaration on Friendly Relations and Co-operation Among States, *supra* note 8.

¹²Western Sahara (Spain v. Mauritania v. Morocco), 1975 I.C.J. 12, 31 (Advisory Opinion) (citing the *Namibia* decision, held that self-determination as expressed in

principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter.

The United Nations has further defined these fundamental rights in an International Bill of Human Rights under which all members are pledged to protect specific fundamental rights, including the right of all people to self-determination. Four separate instruments comprise this Bill of Rights: the Universal Declaration of Human Rights,¹³ the International Covenant on Civil and Political Rights,¹⁴ the International Covenant on Economic, Social, and Cultural Rights,¹⁵ and the Optional Protocol to the International Covenant on Civil and Political Rights.¹⁶ Numerous other declarations and conventions on human rights also have been promulgated through the United Nations.¹⁷

Comparable to the guarantees contained in the International Bill of Rights are the provisions in regional systems for defining and enforcing human rights guarantees. The most significant of these in stature and effectiveness is the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁸ The European Convention established a unique mechanism for monitoring and enforcing regional human rights, which functions independently from

Resolution 2625 is an established principle under international law with respect to peoples in non-self-governing territories).

¹³G.A. Res. 217, U.N. Doc. A/810, at 71 (1948). See Humphrey, *The Universal Declaration of Human Rights: Its History, Impact, and Judicial Character*, in *Human Rights Thirty Years after the Universal Declaration* 21 (B. Ramcharan ed. 1979).

Forty-eight member states of the General Assembly signed the Universal Declaration in 1948. The European Communist states adopted it in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki 1975).

¹⁴G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

¹⁵G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

¹⁶G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

¹⁷See, e.g., Human Rights, A Compilation of International Instruments, U.N. Doc. ST/HR/1/Rev.1 (1978) (containing the text of thirteen instruments on specific human rights).

¹⁸The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter *European Convention*]. There have been five protocols to the Convention. This legal institution is distinct from that of the European Communities system that has as its principal goal the integration of its members into what is referred to as the European Common Market. The latter system also represents an example of how specific individual, as well as national, economic rights and remedies are recognized on the international level.

the national courts of the member states.¹⁹ Its most important feature is the provision permitting acceptance of petitions directly from individuals alleging violations of Convention guarantees. **

A second major regional human rights system parallels the European Convention model. The American Convention on Human Rights²¹ is the basis for an Inter-American human rights system that has its origins in the Charter of the Organization of American States.²² The American system reflects, notwithstanding certain differences, the broad impact the European Convention's success has had on the development of international human rights beyond its region.

A more recent example of a regional declaration on human rights is expressed by the Helsinki Accords of 1975.²³ Considered to be a non-binding European declaration, the Accords also include the United States, Canada, and the Soviet Union as signatories. Among their enumerated human rights is a very broad formulation of the right of self-determination, which asserts that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and political status, without external interference, and to pursue as they wish their political, economic, social, and cultural development."²⁴ Even though the meaning of what constitutes "ex-

For an evaluation of the remedies afforded by the European Convention, see Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 Human Rights L.J. 1 (1980).

**Each of the High Contracting Parties accepts the competence of three international bodies recognized by the Convention: the European Commission on Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe. These controlling institutions operate together to hear and resolve human rights complaints under the Convention.

See generally, L. Mikaelson, *European Protection of Human Rights* (1980); Z. Nejadi, *Human Rights Under the European Convention* (1978); O'Boyle, *Practice and Procedure Under the European Convention on Human Rights*, 20 Santa Clara L. Rev. 697 (1980).

***See* European Convention, *supra* note 18, art. 25. *See also* Kruger, *The European Commission of Human Rights*, 1 Human Rights L.J. 67 (1980); Toth, *The Individual and European Law*, 24 Int'l and Comp. L.Q. 659, 660-662 (1975).

²¹O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. O.E.A./Ser. LIVIII.23 doc. rev. 2, Nov. 22, 1969 (entered into force July 18, 1978).

²²*See* Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3, *amended* Feb. 27, 1970, 21 U.S.T. 607 [hereinafter OAS Charter]. The Conference of the American States which adopted the Charter also adopted the American Declaration of the Rights and Duties of Man in 1948.

**Final Act of the Conference on Security and Co-operation in Europe (Helsinki Accords), Aug. 1, 1975, Dept. of State Bull, Sept. 1, 1975; 14 I.L.M. 1292 (1975). *See generally*, Human Rights, International Law and the Helsinki Accord (Buergethal ed. 1977).

²⁴*Id.* article VI.

ternal interference" was not made clear, the Western nations decried as violations of the Helsinki Accords certain forms of foreign domination by use of force that followed the Accords. After the Soviet Union's invasion of Afghanistan and the Soviet role in Poland's imposition of martial law, the 1981 Conference in Madrid convened to review implementation of the Helsinki Accords. The Conference ended inconclusively.²⁵ As one commentator observed about human rights violations after Helsinki, "[t]here was nothing new about human rights violations, but what was new was that governments could no longer claim that mistreatment of its own citizens was its own business."²⁶

Various bilateral agreements also provide fundamental rights for individuals. Status of forces agreements between states represent one form of bilateral agreement on human rights and protections that are codified with specific enforcement provisions for the benefit of armed forces abroad.²⁷ Military personnel, who are subject to a host country's criminal jurisdiction, have basic human rights guarantees that are provided under the status of forces agreement. A significant example is the NATO Status of Forces Agreement²⁸ and its Supplementary Agreement."

The innumerable international instruments on self-determination and fundamental freedoms illustrate just how well-established human rights are in international law. These agreements have thereby advanced the purpose, stated in the U.N. Charter, of ensuring respect for self-determination and human rights. In so doing, these instruments unambiguously show that human rights are the responsibility of the international community as a whole, and not just a domestic concern of the state. What has lagged behind in this development has been an organized system for enforcing these rights within the context of international law on the use of force by states.

One should distinguish, however, between recognition of the fundamental rights themselves and the ability, or inability, to enforce

²⁵See 2 B. Ferencz, *Enforcing International Law—A Way to World Peace*, 489-91 (1983).

²⁶*Id.* at 490.

²⁷Sohn, *International Law and Basic Human Rights*, 62 U.S. Naval War C. Int'l L. Stud. 587, 595 (1980).

²⁸Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 4 U.S.T. 1792. T.I.A.S. No. 2846 [hereinafter cited as NATO SOFA].

²⁹Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1963, 14 U.S.T. 531. T.I.A.S. No. 5351.

those rights.³⁰ Rights must not be conditioned on the ability to assert them. To do so would suggest that the only international persons who are legally entitled to protection are those who can enforce their rights by force against another, and in particular, against a state. Providing protection of rights to persons who need and deserve such protection is the essence of norms embodied in the Charter's purposes of enforcing human rights and self-determination, and of preserving an international peace grounded in justice. The legal concepts justifying intervening force seek to enhance the enforcement of these rights.

b. Humanitarian Protection in Armed Conflict

Although not expressly addressed in the U.N. Charter and regional instruments? a closely related fundamental right of humanitarian protection in time of armed conflict exists. This protection complements basic human rights by ensuring the health and safety of non-combatants. In international and internal armed conflict, this law of humanitarian assistance is quite well-developed. Humanitarian law embodies very specific provisions applicable under conditions of armed conflict; it operates at a time when the ordinary exercise of human rights becomes impaired by war.³¹

The Geneva Conventions of 1949,³² and, to a lesser extent, their Additional Protocols of 1977,³³ represent affirmative humanitarian

³⁰H. Lauterpacht, *supra* note 4, at 27.

³¹Jakovljevic, *The Right to Humanitarian Assistance – Legal Aspects*, 260 Int'l Rev. Red Cross 469, 471-72 (1987). The term "humanitarian law" covers the two closely connected, yet distinct and independent, disciplines concerned with human rights law and the law of armed conflicts. These two disciplines developed separately in unrelated instruments with different procedures for implementation. The two stem from the same origin, however, that being the common objective of mitigating cruelty against mankind. J. Pictet, *Humanitarian Law and the Protection of War Victims* 11-15 (1975).

See also T. Meron, *Human Rights in Internal Strife: Their International Protection* (1978). Professor Meron observed that "[a]llthough these systems of protection continue to have different institutional 'umbrellas' . . . , a strict separation between the two is artificial and hinders efforts to maximize the effective protection of the human person." *Id.* at 28.

³²Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 351, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

³³Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144/Annex I (1977), *reprinted in* 72 Am.J. Int'l L.

obligations under international law owed to individuals who have become victims of war. War crimes trials are one example of efforts to enforce the obligations that individuals now bear under international humanitarian law.³⁴ Universal jurisdiction over violators of the law of war, and over those who commit other crimes, such as piracy, hijacking, and genocide, focus directly on the roles and responsibilities of individuals in the international community.

The humanitarian rights under the Geneva Conventions vary depending on the category of persons who have become victims of war because their own state is either unable or unwilling to provide them assistance and protect them.³⁵ In addition to the duties incumbent on the parties, Common Article 3 of the Geneva Conventions specifically provides a right of humanitarian initiative by an impartial humanitarian body.³⁶ This neutral humanitarian relief intervention on be-

457-502 (1978)[hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 Annex II (1977), *reprinted in* 72 Am. J. Int'l L. 502-11 (1973) [hereinafter Protocol II]. The United States signed the Protocols subject to understandings, but Protocol I has not been presented for ratification and Protocol II has been sent to the Senate for advice and consent, subject to four reservations and understandings. The Protocols were negotiated by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. In its Final Act, the Diplomatic Conference listed twenty-three separate resolutions of the U.N. General Assembly reaffirming efforts to increase humanitarian assistance and human rights in armed conflict.

See generally M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982); Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 Mil. L. Rev. 3 (1984) (discusses specific measures of implementation in international conflict).

³⁴*See, e.g.*, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, 1946-1949* (1951); and *In re Yamashita*, 327 U.S. 1 (1946).

The case of *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534 (1973), *petition for writ of habeas corpus granted sub nom.* *Calley v. Calloway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), involved a prosecution for murder under the Uniform Code of Military Justice (UCMJ). General courts-martial have jurisdiction over violations of the law of war under Article 18, UCMJ. The UCMJ also recognizes in Article 21 the jurisdiction of military commissions over war crimes as defined under customary international law.

³⁵Blondel, *Assistance to Protected Persons*, 260 Int'l Rev. Red Cross 451, 461-62 (1987).

³⁶The initiative is stated as a right to make an offer to the parties to the conflict. relief organizations, such as the International Committee of the Red Cross (ICRC), also have limited rights to perform specific functions under the Geneva Conventions. Although adhering to principles of impartiality and striving for a low public profile in armed conflicts, the ICRC will publicly denounce violations when considered to be in the victims' best interest. The ICRC and other nongovernmental relief organizations ultimately rely on remedial action by the principal parties and influence by third parties. Meyer, *Humanitarian Action: A Delicate Balancing Act*, 260 Int'l Rev. Red Cross 485, 486-90 (1987).

half of individuals is provided by governmental or nongovernmental organizations, such as the International Committee of the Red Cross. The intervention is by consent of the state as a signatory of the Geneva Conventions and has become essential to enforcement and verification of compliance with humanitarian rights.³⁷

Humanitarian assistance is therefore part of this larger, evolving body of fundamental rights. The general and regional declarations, conventions, and resolutions provide compelling evidence of discrete human rights, including the right of self-determination, which are recognized in international law by substantial agreement. Application of these principles by the International Court of Justice, as well as the efforts of regional systems and humanitarian relief organizations, represent significant evidence of an international standard which all states are called upon to impelment and enforce.

c. Status of Individuals and "Peoples" in the International State System

The international instruments on human rights and humanitarian assistance focus directly on individuals, or categories of individuals, according them status, protections, and responsibilities under the law. Even agreements and treaties directed mainly at defining the jurisdictional rights of states in dealing with each other increasingly are being used to assert individuals' standing to raise the rights.³⁸ A

³⁷Jakovljevic, *supra* note 31, at 471. Humanitarian law instruments have been more systematically promulgated and have been more readily accepted than human rights instruments as part of positive international law. The codification and progressive development of human rights law, however, is rapidly advancing to match that of humanitarian law. T. Meron, *supra* note 31, at 4.

³⁸Individual rights and standing based on status of forces agreements, as discussed previously, illustrate this trend. See *supra* note 30 and accompanying text. Accused individuals have asserted these guarantees personally, challenging the historical view that such treaties or executive agreements provide rights that only the sending state may raise on behalf of the individual. See, e.g., *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (accused soldier had no standing to challenge his return to Federal Republic of Germany under the NATO SOFA as it specifies its own corrective machinery, which is exclusive and nonjudicial). *But cf.* *United States v. Green*, 14 M.J. 461 (C.M.A. 1983) (accused had standing to allege violation of the NATO SOFA where the drafters intended to create an individually enforceable right); *United States v. Miller*, 16 M.J. 169 (C.M.A. 1983) (the double jeopardy provision under the Korean SOFA was intended to define a personal, enforceable right under the treaty); *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982) (quoting the Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 215(b), to suggest that individual standing should be granted). See generally Gordon, *Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 Mil. L. Rev. 49 (1983).

For the propositions that the status of forces agreements themselves represent important international precedent and parallel existing general international law on hu-

common example is that states regularly recognize individual standing to raise personal rights in extradition treaties, most notably in those provisions dealing with the political offense exception when an act of terrorism or subversion is alleged.³⁹ The overall effect has been to accelerate recognition of individuals as subjects of international law. "The canard that individuals are not subjects of international law," Professor Sohn has concluded, "no longer has any basis. It is generally accepted that individuals now have clear rights under international law and various remedies to secure their observance."⁴⁰

Under the traditional view, the state is the exclusive subject of international law and is a distinct entity that is carefully defined.⁴¹ The evolution into an international state system was based on the premise that all fundamental change takes place among states and in the context of state-initiated action.⁴² Although they do not necessarily have the same capacities as states, numerous entities, such as self-governing territories, non-self-governing dependencies, international organizations, intergovernmental consortia, transnational corporations, peoples, and individuals, all have steadily acquired recognition as being imbued with various rights and duties under international law.⁴³

Self-determination as a human right of individuals is principally applied in the context of the political status of identifiable groups, or peoples. The international and regional instruments that have been discussed all suggest the common characteristics that constitute a

man rights, see R. Ellert, NATO "Fair Trial" Safeguards 62, 65 (1963); and Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 Mil. L. Rev. 219, 232-241 (1984).

³⁹*E.g.*, Treaty on Extradition, Oct. 21, 1976, United States-United Kingdom, art. V, 28 U.S.T. 227, T.I.A.S. No. 8468.

A Supplementary Extradition Treaty with Great Britain was concluded on June 25, 1985, as were similar treaties with other countries, in an effort to further narrow the rights that a defendant could raise against the governments' presupposed obligations to each other. In 1986 U.S. courts granted the petitions of four alleged members of the Irish Republican Army and refused to extradite them based on a finding that the crimes were in furtherance of a political revolt in Northern Ireland.

See generally Sofaer, *The Political Offense Exception and Terrorism*, 15 Den. J. Int'l L. & Pol'y 125 (1986).

⁴⁰Sohn, *supra* note 27, at 595.

⁴¹*See, e.g.*, Convention on Rights and Duties of States, art. 1, 49 Stat. 3097, T.S. No. 1, 165 L.M.T.S. 19 ("a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states"). Article 2 of the Convention asserts that the state "shall constitute a sole person in the eyes of international law."

⁴²P. Jessup, *A Modern Law of Nations* 17 (1948).

⁴³Lissitzyn, *Territorial Entities Other than States in the Law of Treaties*, 125 Recueil des Cours 5, 9-15 (1968). *See also* I. Brownlie, *supra* note 4, at 60-71.

certain people. These revolve around their distinct economic, social, or cultural identity. They often have some relationship with a territory, even though sometimes they are displaced from it. The most difficult aspect of defining what comprises a people has been the controversy of national liberation movements (NLM's) that claim to represent peoples. The difficulty lies in making the determination of which particular political NLM is actually entitled to the status of representative. The Palestine Liberation Organization, for example, sits as a full observer in the General Assembly⁴⁴ and actively participated in the Diplomatic Conference on Humanitarian Law in Armed Conflict, which adopted the Additional Protocols to the Geneva Conventions. Concerning other NLM's, the General Assembly also has delegated authority to recognize representatives who will serve as observers to regional organizations.⁴⁵

This issue of who is a proper subject for protection as a "people" paradoxically has become an obstacle to constructive efforts at ensuring self-determination and humane treatment of peoples. As the law struggles to distinguish between popular democratic movements and radical opposition groups, the labels "freedom fighter" and "terrorist" have become interchanged carelessly. The same 1985 General Assembly resolution that reaffirmed the right of self-determination also purported to condemn all acts of terrorism as criminal conduct. The Resolution is widely viewed, however, as permitting an exception for terrorist violence in national liberation struggles against colonial domination, alien occupation, and racist regimes.⁴⁶ "Wars of national liberation" refer generally to armed conflict in which peoples are engaged in resisting the forcible suppression of their right to self-determination as a people.

One example of the difficult issues that national liberation movements generate is presented in Protocol I to the Geneva Conventions which, as discussed previously, provided additional humanitarian rights to noncombatants.⁴⁷ In addition to supplementing those rights, however, Protocol I also explicitly raised wars of national liberation to the level of international armed conflicts. This was done to provide

⁴⁴G.A. Res. 3237, 29 U.N. GAOR **Supp.** (no. 311 at 4, U.N. Doc. Ai9631 (1974).

⁴⁵National liberation movements in Africa receiving recognition by the Organization for African Unity participate as observers in the General Assembly. See G.A. Res. 3280, 29 U.N. GAOR **Supp.** (No. 31) at 5, U.N. Doc. Ai9631 (1974); G.A. Res. 31/30, 31 U.N. GAOR **Supp.** (No. 39) at 118, U.N. Doc. A/31/39 (1976).

⁴⁶Sofaer, *Terrorism and the Law*, 64 *Foreign Aff.* 901, 905 (1986). *But see* Beres, *Terrorism, Insurgency and Geopolitics: The Errors of U.S. Foreign Policy*, 17 *Cal. W. Int'l L.J.* 161-63 (1987) (the lawful cause does not legitimize all forms of violence).

⁴⁷See *supra* notes 32-33 and accompanying text.

additional protections (and obligations) under the law of war.⁴⁸ But, as Abraham Sofaer, Department of State Legal Advisor, has noted, “[n]ever before has the applicability of the laws of war been made to turn on the purported aims of a conflict.”⁴⁹ The criticism implied by that statement is that the just cause criteria for engaging in armed conflict, common in the pre-Charter justifications of use of force, has now simply resurfaced in the guise of fulfilling self-determination under the Charter to the detriment of minimum world order. This view of wars of national liberation, however, inhibits the development of responsible articulations and principles under international law by which to determine when forcible deprivations of self-determination and human rights have occurred, what kind of support a people is entitled to if such deprivations have in fact occurred, and how such determinations should be made.

As to the status of entities other than states that might be able to assert rights under international law, a group in armed opposition to an established government traditionally could rise to the status of belligerent only if it met certain defined criteria. Thus, classified, it could then assert an international status that imposed a legal requirement of neutrality on third states in their relations with the two combatants.⁵⁰ Insurgents, on the other hand, historically had no in-

“Protocol I, *supra* note 33, art. 1, para. 4. Under this paragraph, Protocol I raises “wars of national liberation” to the level of international armed conflicts covered by common article 2 of the Geneva Conventions. International armed conflicts now include armed conflict between states, between a state and a belligerent, and also

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Id. For the proposition that even greater measures beyond Protocols I and II are needed to protect individual rights in noninternational armed conflicts. see T. Meron. *supra* note 37, at 132-33, 139-45.

⁴⁹See Sofaer, *supra* note 46, at 913. See also Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 Akron L. Rev. 531 (1986); Feith, *Law in the Service of Terror—The Strange Case of the Additional Protocol I*, The Nat'l Interest 36 (1986); Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Va. J. Int'l L. 109 (1985). But see Aldrich, *Progressive Development of the Law of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 Va. J. Int'l L. 693 (1986); Solf, *A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 Akron L. Rev. 261 (1986).

⁵⁰See Restatement [Second] Foreign Relations Law of the United States § 94 reporter's note (1965). These prerequisites for belligerent status included: 1) a well-organized opposition group; 2) conventional military operations conducted in compliance with the law of war; and 3) *de jure* or *de facto* control over an identifiable portion of the territory or population.

ternationally recognized status, rights, or duties. The need to resolve the issue of international legal status for insurgents initially arose when a foreign state was sending assistance to the insurgents,⁵¹ or when a substantial portion of the country either supported or was controlled by the rebels, thus posing a serious challenge to the existing government. Although an insurgent group might never achieve *de jure* status as a government, it could be regarded as having achieved limited international status, such as that reflected by the capacity to conclude international agreements concerning specific territory under insurgent control.⁵²

U.S. policy concerning the criteria for recognition of the Afghan resistance as a provisional government provides a current application. The United States informed the Afghan guerrilla leaders that they would have “earned recognition from the international community” once the provisional government demonstrates “control of territory, consent of the people, capacity and willingness to exercise international obligations, [and] possession of a civil administrative apparatus that can govern.”⁵³

2. *The Principle of Nonaggression Against Nations*

a. The Renunciation of Aggression as an Instrument of National Policy

In addition to respect for fundamental human rights and the self-determination of peoples, the second important principle of the U.N. Charter applicable to the support of insurgents is the principle of nonaggression by one state against another. The concepts of nonaggression and self-determination have an inherent tension between them. Nonaggression is primarily, although not exclusively, a principle protecting the sovereign authority of the state within its territory, including its sovereignty over its people, from all external influences adverse to the interests of the state. Article 2(4) of the Charter imposes an obligation on all states to refrain from “the threat or use of force against the territorial integrity or political independence of any

On the status of belligerents and the neutrality of third states, see generally 1 C. Hyde, *International Law* 198-200 (2nd rev. ed. 1945) (noting a decline in formal recognition of belligerent status); H. Lauterpacht, *Recognition in International Law* 187 (1947); 2 L. Oppenheim, *International Law* (7th ed. H. Lauterpacht 1952).

⁵¹See I. Brownlie, *International Law and the Use of Force by States* 327 (1963). Insurgents typically failed to achieve belligerent status because they failed to exercise *de facto* control over an identifiable part of the territory or population..

⁵²L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law: Cases and Materials* 190-91 (1980) (cites as an example the Geneva Agreement of 1954 concerning Cambodia and Laos, which was signed by insurgent representatives).

⁵³N.Y. Times, May 6, 1988, at A1, col. 3.

state" in the conduct of foreign affairs.⁵⁴ Article 2(4) is the culmination of a long history of development of a concept that abandons the use of force as an instrument of national policy.⁵⁵ This prohibition on the use of force inherently includes a prohibition on aggression.

The term "aggression," however, has never been fully defined. Despite the long and diligent efforts that underlie the attempt to define aggression,⁵⁶ Professor Stone concluded that the term would remain somewhat uncertain in its meaning for three basic reasons.⁵⁷ The first is that defining the term would have the perverse effect of limiting its applicability as a prohibition. States would interpret the definition to serve their own national interest, and this would, in turn, diminish both its usefulness and its ability to adapt to the ever-changing circumstances in which conflicts arise. The global experience, Stone suggested, has proven that literal interpretations of definitions of aggression have often been used to circumvent the drafters' intent. The second reason is that aggression is an inherently ambiguous concept because of its reference to intent, a human attribute that the state entity does not have. The result is that aggression, as applied to states, has come to directly signify a judgment of innocence or guilt. Finally, as Professor Stone observed, use of the label "aggression" in most cases constitutes a conclusion about the political relations of nations drawn in the context of all history, "the final interpretation of which, in turn, lawyers can scarcely know, while historians ever debate it."⁵⁸

On the other hand, many scholars, including Professor Brownlie, recognize that while one can evade almost any definition of aggression, such general statements are indispensable, considering the fact that states have accepted rules on the use of force that presume cer-

⁵⁴U.N. Charter art. 2, para. 4.

⁵⁵The history of establishing formal prohibitions on recourse to war against other states represents a rejection of the classic formulation of Clausewitz that war is an extension of national foreign policy. This reformation dates back at least to the early 1900's, most notably to the Kellogg-Briand Pact. *See* General Treaty for the Renunciation of War as an Instrument of National Policy of August 27, 1928, 46 Stat. 2345, 94 L.N.T.S. 63 (entered into force July 24, 1929). *See also* J. Brierly, *The Law of Nations* 408-10 (6th ed. 1963).

For sources on, and an overview of the historical antecedents to Article 2(4) of the Charter, see Gordon, *Article 2(4) in Historical Context*, 10 *Yale J. Int'l L.* 271, 273-75 (1985). *See generally*, A. Thomas & A. Thomas, *The Concept of Aggression in International Law* 19721.

"On the development of a definition of aggression, see I. Brownlie, *supra* note 51, at 351-55; and J. Brierly, *supra* note 55, at 379, 382.

⁵⁷J. Stone, *Legal Controls of International Conflict* 330 (1959).

Id. at 330-34.

tain values prohibiting aggression.⁵⁹ No magic language will keep states from acting on interests they perceive as vital.⁶⁰ That alone, however, is not a valid reason to abandon the search for a definition. Ultimately, whether a satisfactory definition can be found becomes a relatively insignificant point, because the real difficulty arises when trying to determine actual facts of a particular conflict, not whether the facts fit a particular definition.⁶¹ In general, three broad categories of aggression define the means by which states may significantly affect the interests of other states: armed aggression (direct military force); indirect aggression (covert acts against the civil government, such as by aiding resistance movements); and economic or ideological attacks.⁶² The focus in the context of state support of insurgency is primarily on indirect aggression as a violation of traditional principles of international law.

The definition of aggression also has been the subject of United Nations resolutions and declarations. An example is Resolution 2625, the Declaration on Friendly Relations and Cooperation Among States. Under the resolution, no state may take any action aimed at either the total or partial impairment of the territorial integrity or national unity of another.⁶³ States must employ peaceful means in the resolution of disputes consistent with the purposes and principles of the Charter.⁶⁴

Resolution 3314,⁶⁵ The "Definition of Aggression" resolution, makes any first use of armed force *prima facie* evidence of aggression⁶⁶ that, unless adequate justification for the act can be shown, becomes a breach of international responsibility.⁶⁷ Resolution 3314 adopts a definition of aggression that goes beyond the use of armed force to include other acts directed against the territorial integrity or political independence of another state in a manner inconsistent with the Charter's purposes.⁶⁸ The resolution lists certain acts that constitute aggression,⁶⁹ but also indicates other cases in which the use of force is lawful.⁷⁰

⁵⁹See I. Brownlie, *supra* note 51, at 355-56.

⁶⁰M. McDougal & F. Feliciano, *Law and Minimum World Public Order* 152-53 (1961).

⁶¹I. Brownlie, *supra* note 51, at 357.

⁶²*Id.* at 356.

⁶³The Declaration on Friendly Relations and Co-operation Among States.

⁶⁴*Id.*

⁶⁵G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter The "Definition of Aggression" Resolution].

⁶⁶*Id.* art. 2.

⁶⁷*Id.* art. 5.

⁶⁸*Id.* art. 1.

⁶⁹*Id.* art. 3.

⁷⁰*Id.* art. 6.

In its definition of aggression, Resolution **3314** specifically includes in Article 3, “[t]he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”⁷¹ Although it prohibits all forms of aggression, Resolution **3314** also very explicitly states that its definition of aggression does not preclude the exercise of the right of self-determination, the right of peoples to struggle against forcible deprivation of freedom and independence, nor the right to seek and receive support in the struggle.⁷²

An apparent inconsistency therefore exists under Resolutions **3314** and **2625**. Certain peoples have the right to overthrow repressive regimes and to receive some degree of external assistance in achieving self-determination, as viewed from the perspective of those peoples. Yet such external “support” provided by a state must conform to the general prohibition on interfering with the territorial integrity and political independence of another state. The apparent inconsistency really can only be resolved by returning to the basic Charter purposes that originally contemplated self-determination and state sovereignty as being mutually reinforcing principles. Any other formulation would effectively embrace one of the principles to the exclusion of the other. Therefore, if the right to receive support in seeking self-determination is to retain any meaning under Resolutions **3314** and **2625**, certain forms of external assistance that are otherwise defined as direct or indirect aggression may be permissible if they are provided in support of a people struggling for self-determination. We should consider next exactly what forms of external support are acceptable under current restrictions on aggression.

⁷¹*Id.* art. 3.

⁷²*Id.* art. 7. which states:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

One can also see the same emphasis on colonial, alien, and racist regimes (sometimes referred to by the acronym “CAR’ regimes) that is contained in the Geneva Conventions’ Additional Protocols, discussed previously. *See supra* note 46 and accompanying text.

b. The Prohibition on Intervention and the Use of Force

Under customary international law and the law of the U.N. Charter, the restrictions on aggression find application in the general duty of nonintervention by states. The Charter addressed the prohibitions on intervention most emphatically in Article 2(4), which prohibits the unlawful threat or use of force. Other general international instruments have explicitly affirmed this prohibition, while routinely emphasizing the interrelated purposes of protecting the sovereignty and political independence of states on the one hand, and ensuring respect for equal rights and the self-determination of peoples on the other.⁷³

Historically, international law defined intervention as an unlawful act interfering with the political independence and fundamental freedoms that were mostly, if not exclusively, part of internal conditions within the control of the state. Nonintervention contemplates a state's exercise of a right to govern free from all external coercion or interference by other states.⁷⁴ This self-government was among "the

⁷³See, e.g., Declaration of the Admissibility of Intervention into the Domestic Affairs of States, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965). Resolution 2131 states in part:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are condemned;

2. No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State;

3. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention:

....

6. All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

The Soviet Union proposed this declaration of principles on nonintervention. The General Assembly adopted the final draft on December 21, 1965, by a vote of 109 in favor, none against, with the United Kingdom abstaining. 20 U.N. GAOR, U.N. Doc. A/PV 1407 (1965).

⁷⁴A. Thomas & A. Thomas, *Non-Intervention* 68 (1956).

sovereign prerogatives” encompassing “the supreme authority to control all persons and things within a state’s boundaries.”⁷⁵

The post-Charter system seeks to continue this principle that one state does not intervene in the domestic affairs of another, in part through Article 2(7) of the U.N. Charter, which states that “[n]othing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” Respect for the territorial integrity and the political independence of neighboring states provides a degree of stability among states that contributes to international peace and security. Ideally, nonintervention also helps preserve the rights of a state’s populace. When a state is actually fulfilling its obligation under international law to protect the human rights of its own nationals, the populace of that state receives general protection under law from any external interference with those rights by other states.

The roots of nonintervention also run deeply through regional instruments, paralleling the principles of respect for human rights and self-determination as they appear in the U.N. Charter. This is particularly true in the Inter-American documents to which the United States has been a signatory, most notably the very broad statement of principle in Article 15 of the Charter of the Organization of American States.⁷⁶ The renunciation of the threat or use of force expressly appears in the OAS Charter⁷⁷ and in Article 1 of the Rio Treaty.⁷⁸

⁷⁵*Id.* at 71.

⁷⁶OAS Charter, *supra* note 22. Article 15 states:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

Article 19 narrows the broad statement by providing that measures adopted for the maintenance of peace and security consistent with existing treaties would not violate the prohibition on intervention.

⁷⁷*Id.* arts. 16-18. The Seventh Meeting of Consultation of Ministers of Foreign Affairs, convened under the OAS Charter, reaffirmed the prohibition on intervention in the Declaration of San Jose, Costa Rica, August 28, 1960. Article 3 of the Declaration addressed the principle in the context of national and individual fundamental freedoms:

[T]hat each state has the right to develop its cultural, political, and economic life freely and naturally, respecting the rights of the individual and the principles of universal morality, and as a consequence, no American state may intervene for the purpose of imposing upon another American state its ideologies or its political, economic, or social principles.

⁷⁸Inter-American Treaty of Reciprocal Assistance Between the United States of America and Other American Republics (Rio Treaty). Sept. 2, 1947, 62 Stat. 1681.

The OAS Charter and the Rio Treaty, both of which the United States has signed, rest on the fundamental assumption that “the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”⁷⁹

Despite widespread consensus on the existence of this duty of nonintervention, jurists do not agree on the prohibition’s meaning or the extent of its applicability. Far less consensus exists in the actual practice of states which, apart from principles of law, also reflects such diverse policy motivations as the balance of power, competing ideologies, and humanitarian concerns.⁸⁰ Whether nonintervention as a rule protecting the sovereignty of states retains enough vitality to prevail in practice depends on the capacity of law to cope with these competing factors. “Specifically,” one authority has observed, “it is in the international law of internal war that the simple doctrine of nonintervention is held to have received a challenge to which it cannot effectively respond.”⁸¹

These “internal wars” become a visible expression of grievances that often are alleged by the insurgents to be a failure of the state to satisfy its fundamental obligation to protect the rights of nationals within its authority. Typically, an emerging entity makes its demands on the established government and makes appeals abroad for external support.⁸² If the demands represent grievances that appear to the international community to be substantiated, then pressure for intervention mounts, because human rights, a key component of international law under the Charter, apparently are being violated.

T.I.A.S. No. 1838, 21 U.N.T.S. 77 (entered into force Dec. 3, 1948) [hereinafter Rio Treaty].

The drafters of the Rio Treaty intended to provide for shared responsibility among the American states for hemispheric peace and security consistent with the Monroe Doctrine, and thereby close an era of United States protective intervention. R. Vincent, *Nonintervention and International Order*, 195-97, 207 (1974).

⁷⁹R. Vincent, *supra* note 78, at 196 (quoting Article 5 of the OAS Charter).

⁸⁰A. Thomas & A. Thomas, *supra* note 74, at 67; R. Vincent, *supra* note 78, at 11-12 (also provides an extensive bibliography of sources on the development and current applications of the concept of nonintervention).

⁸¹R. Vincent, *supra* note 78, at vii. Professor Vincent concludes, however, that the essential means do exist within international law to control internal conflicts in an effective and realistic approach to establishing international order.

⁸²See A. Organski, *World Politics* 234-43 (1968). Organski observed that emerging nationalistic groups under alien authority, whether colonies in the classical sense or other forms of dependency, made increasing demands as part of a normal and predictable process of movement to independence. First comes unification for basic human rights, then the demands for political independence, and finally, the efforts to achieve economic independence.

The paradox under traditional law is that, while the conflict itself has not been internationalized, the underlying cause is recognized as having international dimensions under equally well-established international law.

The applicability of nonintervention principles therefore should be viewed in a context broader than just the relations of states. As the significance of state sovereignty has declined somewhat, relative to emerging international entities such as "peoples," nonintervention principles have also had to take cognizance of these other entities.⁸³ Nonintervention, therefore, has had to evolve as one part of the larger process by which international law increasingly recognizes the rights of individuals, peoples, and national movements. This often occurs accompanied by an erosion of the principle of inviolability of state sovereignty.

c. Use of Force Options and the Levels of Conflict

Intervention as a concept embraces a wide range of options involving varying degrees of external pressure being applied by the intervening state. Post-Charter international law particularly seeks to control the use of force, which is a severe and destabilizing form of intervention.⁸⁴ Scholars generally agree that in addressing the use of force, the Charter refers to "armed force."⁸⁵ The use of force, or just the threat of force, tends to foreclose the various lesser options lawfully available to influence state behavior, even when the purpose of the force is carefully limited.⁸⁶ The Charter system of controls combines specific restrictions under the Charter with vestiges of the pre-Charter law on aggression under customary international law.

The result is an elaborate structure of multilateral and unilateral

⁸³R. Vincent, *supra* note 78, at vii. Vincent asserts that the historical forces undercutting the nation-state system also tend to undermine the rule of nonintervention. *Id.* at 349-50. Among them he cites the proliferation of small states and technological advances that make "the small less unequal." Nonetheless, he observes that in state practice a relative caution shown by states before they become involved in civil wars, especially by superpowers outside their spheres of influence, that suggests nonintervention does have force and utility as a principle. *Id.* at 359-60.

⁸⁴The threat or use of force is a particular form of intervention, a form which has been characterized as "dictatorial interference" in the internal and external affairs of another state. See J. Brierly, *supra* note 55, at 402; A. Thomas & A. Thomas, *supra* note 74, at 68.

⁸⁵A. Organski, *supra* note 82, at 117. He notes, however, that "[n]ations will hardly forgo the use of force in areas where disagreement is so fundamental that persuasion reward, and punishment are without result." *Id.*

⁸⁶J. Brierly, *supra* note 55, at 415 (citing the Preamble to the U.N. Charter which states "that armed force shall not be used").

response options tailored to various situations.⁸⁷ Whether these response options involving the use of force are legal should be measured by objectively reviewable criteria. This presumably would dispense with the need to subjectively evaluate an intervenor's intent.⁸⁸ Even if an intervention by force could be examined objectively, however, the motivations of the principal actors would still be relevant to those decision makers who might be called upon to respond.⁸⁹ State policy makers constantly attempt to determine each other's motives in order to anticipate actions. The motives are then interpreted as policy objectives and thus acquire practical significance by influencing reactive decisions.⁹⁰

The legitimacy of force as an option at any level of conflict depends on such factors as the recognized international status of the actors, the type of provocation to which the use of force responds, and the nature of the force employed. The lawfulness of intervention to support insurgents focuses initially, under traditional international law, on whether the conflict has risen to an internationally recognized level.⁹¹ International law sought to isolate internal, domestic conflict until a rebellion essentially forced itself on the international community by establishing a new entity. At that point, rights and duties of third-party states had to be reallocated.⁹²

That category of conflict, now referred to as low intensity conflict, includes two of the three traditional levels of armed conflict. If the conflict was still in the initial stage, it was characterized as internal disruptive actions, generally regarded as typical criminal activity, to which domestic law would apply. The next level is insurgency in which there is an insurgent military organization and perhaps some de facto control of territory, although still lacking at least some of the criteria required for full international status as a belligerency. If the rebel forces receive substantial support from or are controlled by a

⁸⁷For examples of analytical models of conflict by several scholars, see generally Vietnam War and International Law (R. Falk ed. 1972); and J. N. Moore, Law and the Indo-China War (1976). One example, developed by Professor Falk, matches four categories of armed conflict with appropriate levels of force. Professor Moore balances nonintervention principles against the basic community values of self-determination, the preservation of minimum human rights, and the maintenance of minimum public order. A general analysis of these nonintervention standards in internal war may be found in R. Vincent, *supra* note 78, at 317-25.

⁸⁸See I. Brownlie, *supra* note 51, at 377 (referring to the difficulties of determining the *animus aggressionis*).

⁸⁹See I. Brownlie, *supra* note 51, at 337-78.

⁹⁰See A. Organski, *supra* note 82, at 110-11.

⁹¹International recognition of the conflict reflects the historical problem of insurgent groups' lack of status under International Law. See *supra* notes 50-52 and accompanying text.

⁹²R. Vincent, *supra* note 78, at 285-86.

foreign state, then that state would be responsible for an act of indirect aggression in violation of the Article 2(4) prohibition on the use of force.⁹³

With respect to the third level of conflict, the practice of recognizing formal belligerent status has declined.⁹⁴ The line distinguishing internal conflicts from those of an international character also has become less distinct for reasons that are closely tied to the increased recognition of humanitarian law and human rights.⁹⁵ The lawfulness of the use of force in support of insurgents will therefore depend initially on the insurgent group having attained at least some degree of international status, either under the traditional rules of statehood and sovereignty, or under the developing standards recognizing other international persons and fundamental rights. Nonetheless, under traditional principles any third state military aid to or control over rebels opposing the constituted government is almost always considered to be an unlawful use of force, absent a sufficient justification and the employment of proportionate means of force. Former Secretary of State Dean Rusk, as the honoree of a law professor's workshop on internal conflict and insurgency support, commented on this central issue now confronting international law:

Older distinctions between internal and international wars seem to be melting away because of the direct or indirect involvement of other nations in internal conflicts. Just as human rights are now no longer a purely internal affair, it may be that internal wars must become a matter of concern to the community of nations because they so frequently affect the possibilities of organizing a durable peace.⁹⁶

The principles of fundamental rights and lawful use of force, therefore, are uniquely and inextricably intertwined in the area of wars of national liberation. The challenge of controlling the use of force, while seeking to protect fundamental human rights on the basis of

⁹³I. Brownlie, *supra* note 51, at 370. The "Definition of Aggression" Resolution, *supra* note 65, art. 3. includes among its enumerated acts of aggression "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

⁹⁴See *supra* note 50 and accompanying text.

⁹⁵See *supra* notes 48-49 and accompanying text.

⁹⁶"*Coping with Internal Conflicts: Dilemmas of International Law*. 13 Ga. J. Int'l & Comp. L. 179-80 (Supp. 1983). This volume presents a series of articles and panel discussions by prominent participants at a workshop that considered the need to develop legal principles to control internal conflicts threatening international stability. Its dialogue illustrates the difficulties and controversy associated with characterizing third state involvement in low intensity conflicts.

objectively reviewable standards, is of increasing practical significance to the continuing vitality of international law. What measure of success that has been achieved in defining aggression as a limit on state conduct under the rules on the use of force should similarly provide direction in meeting the challenge of establishing an analogous set of criteria for defining self-determination as a limit on state conduct.

B. JUSTIFICATIONS FOR INTERVENTION IN INSURGENCIES

Legal bases for the lawful use of force have been employed with differing degrees of support and acceptance by legal authorities. The justifications generally derive either from the principles of the U.N. Charter system or from interpretations of customary international law. Among these justifications are the rights of self-defense by either individual or collective action, protection of nationals, invitation of the recognized government, counterintervention, and humanitarian intervention.⁹⁷

1. Individual or Collective Self-Defense

Article 51 codifies a right of individual and collective self-defense subject to the principles of the Charter and the U.N. system of dispute resolution.⁹⁸ The right is triggered by an "armed attack," a term which has specialized meaning when applied to the support of insurgents. External support of military and paramilitary forces still may

⁹⁷The basic categories of the use of force vary in number depending on how they are identified. Professor Reisman enumerates nine potential categories for intervention involving military force: self-defense; intervention within a sphere of influence or critical zone of defense; humanitarian intervention; self-determination and decolonization; intervention to replace an elite in another state; treaty-sanctioned intervention; intervention to gather evidence for international proceedings; enforcement of international judgments; and countermeasures, such as reprisal or retortion. Reisman emphasizes, however, that the categories in themselves are not determinative of lawfulness. See Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 *Yale J. Int'l L.* 279, 281-82 (1985).

⁹⁸See U.N. Charter art. 51, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

constitute a threat or use of force that violates Article 2(4) without rising to the level of an armed attack. If so, Article 51's right of self-defense would not apply.

The definition of the phrase "armed attack" was a significant issue before the International Court of Justice (ICJ) in 1986. The court held that the United States was engaged in an armed attack against Nicaragua through the extensive arming and training of the anti-Sandinista rebels, known as Contras.⁹⁹ The ICJ also held, however, that assistance to rebels in the form of providing weapons or logistical support *alone* did not necessarily constitute an armed attack.¹⁰⁰ For that reason, the ICJ held that the Sandinista government's support of insurgents in El Salvador, Honduras, and other Central American countries did not constitute an armed attack. Therefore, the United States' use of force that did amount to an armed attack was not a justifiable response under self-defense.¹⁰¹ On the other hand, the court held that lesser forms of support, such as the military maneuvers of the United States near the Nicaraguan border and the supply of funds to the Contras, did not constitute a "use of force" against Nicaragua.¹⁰²

Article 51 explicitly acknowledges the "inherent right" of self-defense against armed attack. This inherent right has been interpreted as referring to a broader pre-existing right of self-defense against aggression under customary international law.¹⁰³ A contrary, more restrictive view has been presented by Professors Brierly and Brownlie, who observed that the Charter structure was intended to give the United Nations a "near monopoly" on the use of force, and that therefore, Article 51 should be limited by Article 2(4)'s stricter prohibition.¹⁰⁴ Professors McDougal and Feliciano concluded that an independent right of self-defense against the use of force still exists,

⁹⁹The term "Contras" is used in this article to refer to the organized group that currently is resisting the established government in Nicaragua, known as the "Sandinista" government. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 201 (Judgment on the Merits of 27 June) *reprinted in* 25 Int'l Legal Mat. 1023 (1986) [hereinafter *Nicaragua v. United States*]. The operative part of the judgment and the summaries of the judgment and separate opinions, official documents provided by the court, are reprinted in 25 Int'l Legal Mat. 1089 and in 80 Am. J. Int'l L. 785 (1986).

¹⁰⁰*Nicaragua v. United States*, *supra* note 99, at para. 201.

¹⁰¹*Id.* para. 205.

¹⁰²*Id.* paras. 227-38.

¹⁰³D. Bowett, *Self-Defense in International Law* 185-86 (1958).

¹⁰⁴*See* J. Brierly, *supra* note 55, at 405-08 (stating that "nearly every aggressive act is sought to be portrayed as an act of self-defence"); I. Brownlie, *supra* note 51, at 270-75.

but the degrees of necessity and proportionality required under customary international law are no less restrictive than the Charter's limitation on self-defense against armed attacks.¹⁰⁵ This latter view essentially prevailed in the ICJ.¹⁰⁶

The right of self-defense against armed attack has additional significance with respect to the international legal status of insurgents engaged in internal war. Article 1 of the "Definition of Aggression" Resolution (Resolution 3314) defined aggression as "the use of armed force by a State against the sovereignty, territorial, or political independence of *another State*, or in any other manner inconsistent with the Charter of the United Nations." According to an explanatory note that accompanies the article, the term "State" is used "without prejudice to questions of recognition."¹⁰⁷ The right of self-defense at times has been asserted against entities not formally recognized as states. Indeed, basic world community policy on competence to defend against aggression does not depend on formal recognition of statehood. This is particularly true under traditional principles where a newly organized territorial body or two distinct territorial units are involved, so long as the international community perceives the entities as being relatively permanent." Since a right of self-defense may be asserted against an entity not fully recognized as a state, it follows by implication that such an entity might similarly be entitled to invoke the right. The extreme situation under this argument would be that a third state, rather than invoking its own right of self-defense in support of insurgents, might assert a claim of engaging in collective action to vindicate the emerging entity's right of self-defense.

The traditional principles on the right of self-determination contrast with a recent, expanded concept of collective self-defense articulated principally by Professor J. N. Moore.¹⁰⁹ The Reagan Administration unsuccessfully offered collective self-defense as a partial justification for its support of the Nicaraguan Contras.¹¹⁰ The concept, as

¹⁰⁵M. McDougal & F. Feliciano, *supra* note 60, paras. 232-44.

¹⁰⁶See *Nicaragua v. United States*, *supra* note 99, paras. 183-200.

"The "Definition of Aggression" Resolution, *supra* note 65, art. 1, explanatory note (a) (emphasis added).

¹⁰⁸M. McDougal & F. Feliciano, *supra* note 60, at 220-22 (citing as examples the U.N. Security Council decisions in the 1948 case of Palestine and the 1950 case concerning the two Koreas).

¹⁰⁹See Moore, *The Secret War in Central America and the Future of World Order*, 80 Am. J. Int'l L. 43 (1986).

¹¹⁰Although the United States had withdrawn its consent to the jurisdiction of the court, the International Court of Justice in the case brought by Nicaragua did consider

enunciated by Moore, is designed to identify those uses of force in low intensity conflict that pose an actual threat to the security of neighboring countries in a region. The right would apply where the force falls short of an armed attack that would trigger the traditional right of self-defense. This view of the right of self-defense seeks to strike at the increasing instances of "covert wars," in which a revolutionary regime secretly trains and deploys guerrilla forces against established governments of other states while publicly denying using force in order to preserve its own rights and protections under the Charter.'" Moore's expanded concept of collective self-defense has been highly controversial, both as an academic position and as matter of policy.¹¹²

Collective action under Chapter VII of the Charter, including the right of collective self-defense under Article 51, is not as strictly confined to the prerequisites of customary law as is individual self-defense.¹¹³ A relevant reminder of how post-Charter law continues to develop is the now clearly established right of collective self-defense. This concept had to evolve through a period of controversy over whether the "self" in self-defense could ever provide to other participants any right to use force that they did not already have on their own.¹¹⁴ Through the example of collective security, McDougal and Feliciano provide insight on this process of changing community norms and the policy decisions the process affects:

A "legal concept" of self-defense, like any other concept, can be given empirical reference only in terms of who, for what

the record of factual allegations publicly made by the Administration against the Sandinista regime, but the court declined to apply the lesser threshold for the right of Self-defense.

¹¹¹Moore, *supra* note 109, at 43-44. See also Moore, *Grenada and the International Double Standard*, 78 Am. J. Int'l L. 145 (1984); Rostow, *Nicaragua and the Law of Self-Defense Revisited*, 11 Yale J. Int'l L. 437, 450 n.51 (1986) (contains a very useful review of the major sources on what constitutes an "armed attack"). Rostow criticizes the "double standard" under traditional international law that protects radical regimes. He concludes that in order to lower the threshold for general war, states that are attacked should be allowed, under the right of self-defense, to adopt as a minimum the methods of the aggressor states.

¹¹²Professor Moore's article, *supra* at note 109, was followed by an exchange of published arguments. See Rowles, "Secret Wars," *Self-Defense and the Charter - A Reply to Professor Moore*, 80 Am. J. Int'l L. 509 (1986); Moore, *The Secret War in Central America - A Response to James P. Rowles*, 27 Va. J. Intl L. 273 (1987).

¹¹³M. McDougal & F. Feliciano, *supra* note 60, at 257. On unilateral measures of intervention in general, see *Restraints on the Unilateral Use of Force: A Colloquy*. 10 Yale J. Intl L. 261 (1985). The series of articles presented in the colloquy focuses on "whether the Charter regime continues to provide meaningful guidelines for contemporary policymakers." *Id.*

¹¹⁴See M. McDougal & F. Feliciano, *supra* note 60, at 247-53.

purposes and under what conditions, uses and applies the concept. The expectations both of the general community and of particular authorized decisionmakers about lawfulness (that is, reasonableness) do and must change through time as the conditions of use and application change.¹¹⁵

2. *Protection of Nationals*

The right of a state under international law to defend its nationals may include a limited right to protect one's nationals in a foreign state.¹¹⁶ Some authorities dispute that a lawful basis for such intervention exists.¹¹⁷ The United States is among the minority of states that asserts the justification.¹¹⁸ The side one takes on this issue broadly depends on the extent to which one recognizes protection of nationals as a matter of legal necessity associated with either the theory of self-defense or the theory of humanitarian intervention, a separate justification to be examined in detail later. This justification applies to the situation in which the host nation's government has failed in its duty to provide adequate protection against imminent physical danger and alternatives short of the use of force would be ineffective.¹¹⁹ Permissible action includes direct military force, but only by using that degree of force, for that period of time, reasonably necessary to ensure the safety or removal of one's own nationals.'''

The limited nature of this form of intervention under a narrow interpretation probably would preclude its use as a legitimate means of providing support to insurgents, even if one's nationals are present and operating within the general field of action. This is because such action normally would exceed the scope of the rescue purpose. Any additional arms, equipment, and military personnel inserted during the operation beyond that needed for the rescue mission would constitute unlawful excess force. In addition, the presence of nationals being rescued cannot have been the result of a previous unlawful in-

¹¹⁵*Id.* at 253.

¹¹⁶D. Bowett, *supra* note 103, at 87-105 (observing that protection of nationals was a part of customary international law that still survives under the U.N. Charter prohibitions on the unlawful use of force); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *Recueil des Cours* 451, 166-67 (1952).

''See, e.g., I. Brownlie, *supra* note 51, at 292-301 (conceding that the issue presents "particular difficulties"); L. Henkin, *How Nations Behave* 145 (1963). *But see* Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, *Law and Civil War in the Modern World* 229 (1974).

¹¹⁸I. Brownlie, *supra* note 51, at 292-93. On the United States' recent assertion of the right of intervention to protect nationals, see Riggs, *The Grenada Intervention: A Legal Analysis*, 109 *Mil. L. Rev.* 1, 16-36 (1985).

¹¹⁹J. Brierly, *supra* note 55, at 427-28.

¹²⁰On the conditions for lawful intervention to protect nationals, see Waldock, *supra* note 116, at 467.

tervention designed to create the pretext of a rescue. This implies that personnel serving as trainers, advisers, or combatants with insurgents in the field are either inappropriate subjects for lawful intervention by rescue, or must already be lawfully assisting the insurgents under a legal basis for intervention. The availability of another legal basis for intervention, of course, would simply negate the need to use rescue as a justification to support insurgents.

3. *Intervention by Invitation*

Uncertain and contradictory authority exists on the issue of whether intervention is permitted on behalf of an established government at the specific request of that government.¹²¹ One position is that the invitation may be accepted until full belligerency status is accorded the principal parties in civil war, at which point, the strict neutrality rules would become applicable.¹²²

The rationale in favor of permitting intervention by invitation relates to an absolutist view of sovereign rights of state authority over the internal conflict; the matter simply did not involve a right or duty under international law.¹²³ The validity of this traditional position prevails today, but only regarding sovereign police authority to enforce domestic law and order during internal disturbances short of insurgency. International law permits, and the United States remains committed to, demonstrations of support to friendly nations through security assistance to control domestic disorder.¹²⁴

The emerging legal trend now runs against this traditional doctrine.¹²⁵ A rule permitting intervention on behalf of the government in power during an insurgency does not enhance a goal of isolating the domestic conflict to prevent a widening of hostilities. In one sense, however, the distinction as to whether the conflict is purely internal or is externally supported is likely to be of minimal significance in most situations because of the international dimensions that so-called internal wars increasingly have on their own. Interven-

¹²¹I. Brownlie, *supra* note 51, at 321-27.

¹²²*Id.*

¹²³*Id.* at 321-22.

¹²⁴Even though traditional principles might view continued support to the government as unlawful intervention, an argument exists that, as disorder intensifies and escalates into organized insurgent activity, it would also be unlawful to stop the flow of security assistance to the established government. To stop the support might tip the balance against the government as a form of unlawful intervention. Moore, *Legal Standard for Intervention in Internal Conflicts*, 13 Ga. J. Int'l & Comp. L. 191, 196 (Supp. 1983).

¹²⁵See A. Thomas & A. Thomas, *supra* note 74, at 93-94; Perkins, *The Right of Counterintervention*, 17 Ga. J. Int'l & Comp. L. 171, 183-95 (1986) (provides at 185 n.43 a review of contemporary sources criticizing the traditional rule).

tion by invitation is often at odds with the international goals of preventing external domination and of ensuring the right of a people to establish for themselves their political independence and a representative form of government.¹²⁶

The decline in legal authority for intervention on behalf of the government fighting against insurgents corresponds to the gradual decline in the emphasis on state sovereignty as the exclusive focus of world order. Self-determination expressed as a coequal principle under post-Charter international law at least requires that the external use of force not be permitted to tip the scales against a pluralistic, representative government—whether one in existence or one in the making. What is lacking under the traditional rule is a means by which to determine objectively whether intervention on behalf of a nonrepresentative government is violating this duty of states to refrain from forcible action interfering with a people's legitimate struggle for independence.

Another reason exists for the decline of intervention by invitation as a legal basis. Under classical interpretations of customary international law, no corresponding right of intervention (or right of "counterintervention") was permitted to other foreign states offering support as requested by the insurgents. As a result, there was no offset for the foreign support being received by the government. This became a further obstacle that was imposed against self-determination by a one-sided rule denying counterintervention in favor of insurgent groups. That rule, to be examined next, is also undergoing change under international law.

4. *Counterintervention in Support of Insurgents*

Post-Charter developments¹²⁷ in the area of insurgency counterintervention are especially relevant to international law and inter-bloc foreign relations.¹²⁸ An expanding body of literature advocates the

¹²⁶The members of the General Assembly adopted Resolution 2625, "[c]onvinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality." The Declaration on Friendly Relations and Co-operation Among States, *supra* note 8 (emphasis in original).

¹²⁷Resolution 2625, on the issue of peoples opposing foreign intervention, states that "[i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." *Id.*

¹²⁸See Perkins, *supra* note 125, at 180-83. Perkins observes that counterintervention enhances a balance of power by helping to preserve the status quo against any foreign coercion or interference with the right of self-determination. *Id.* at 183.

right of counterintervention in support of insurgent forces in those states where a foreign state has already intervened on behalf of the established government.¹²⁹ The arguments take several forms and, for the most part, presuppose intervention by invitation to be an insufficient legal justification for the initial intervention.

One view considers counterintervention to be an inherently permissible international sanction in response to an unlawful initial intervention.¹³⁰ The conflict in Afghanistan is one example of what may be characterized as unlawful intervention at the invitation of an Afghan government installed by the Soviet Union from the outset.¹³¹ In the absence of any United Nations sanctions, the right of counterintervention would accrue to the members of the international community. The absence of an effective international remedy, such as counterintervention, would promote greater disorder by allowing unrestrained adventurism that violates even the most fundamental prohibitions on the use of force.¹³²

The right of counterintervention, according to another and more controversial perspective, is not really intervention at all. This position focuses on Article 2(4)'s qualifying phrases on the prohibition on uses of force "against the territorial integrity or political independence," and "in any manner inconsistent with the Purposes of the United Nations." In effect, this right, by promoting the objectives of discouraging disorder, and by helping to ensure self-determination and fundamental rights, simply accomplishes that which the Charter itself seeks to achieve.¹³³

¹²⁹See, e.g., *id.* at 224. See also Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1642 (1984); Sohn, *Gradations of Intervention in Internal Conflicts*, 13 Ga. J. Int'l & Comp. L. 225, 229-30 (Supp. 1983).

¹³⁰See e.g., Perkins, *supra* note 125, at 176-80. See also E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 136 (1984).

¹³¹"Professor Reisman has argued that the successive General Assembly Resolutions condemning the Soviet invasion of Afghanistan and its imposition of a nonrepresentative government have failed to take "full advantage of the legal vocabulary that the Assembly itself has developed for such events." He concludes that the result has deprived the Afghan resistance, as well as its third state supporters, of substantial international authority in a struggle for self-determination against the Soviet-backed Kabul government. See Reisman, *supra* note 10, at 907-08.

¹³²This view of counterintervention as a lawful sanction is distinct from a second view that considers the action to be a right of reprisal. See generally, Akehurst, *Reprisals by Third States*, 1970 Brit. Y.B. Int'l L. 1; Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 Am. J. Int'l L. 586 (1972).

¹³³See Perkins, *supra* note 125, at 201. But see I. Brownlie, *supra* note 51, at 265-68.

Professor Yoram Dinstein represents the conservative view that the U.N. Charter does not incorporate intervention in support of self-determination or human rights. "The long and short of it is that, in the name of justice, the existing legal proscription on the use of inter-State force is corroded by political motivations." Y. Dinstein, *War*.

All of these interpretations purport to employ lawful force in a manner that is not exclusively reserved to the United Nations enforcement mechanism, thereby preserving the right of states to counterintervene in insurgency both collectively and unilaterally. The right to counterintervene in insurgency must be limited to a necessary and proportional response to a prior illegal use of force by a third party state.¹³⁴ The requisite necessity and proportionality also suggest that the right of counterintervention in insurgency should not be construed to permit a use of force by the counterintervening state against the territory of the state that first intervened illegally.¹³⁵

5. *Humanitarian Intervention*

The most consistently controversial justification for intervention on behalf of insurgent groups has been intervention for humanitarian purposes. Humanitarian intervention has often been denounced by legal authorities as being essentially unlawful under all circumstances at all times.¹³⁶ Others point to the long historical development of humanitarian intervention in natural law and analytical jurisprudence, recognized by international legal scholars from Vattel and Grotius through Oppenheim and Lauterpacht, and continued by the humanitarian principles of the U.N. Charter, the Universal Declaration of Human Rights, and the stream of post-Charter human rights instruments.¹³⁷

One controversial aspect of humanitarian intervention is that abuses tend to offset the humanitarian benefits by posing a greater

Aggression and Self-Defence 69 (1988). He concludes that the interpretation of humanitarian intervention as being compatible with the purpose underlying Article 2(4) can be dismissed as misconstruing the Charter. "Nothing in the Charter substantiates the right of one State to use force against another under the guise of ensuring the implementation of human rights." *Id.* at 89. Apart from the Article 51 exception for self-defense, any action must be left to collective measures by the U.N. Security Council. *Id.*

¹³⁴Perkins, *supra* note 125, at 221.

¹³⁵*Id.* at 222-23.

¹³⁶*See e.g.*, I.L. Oppenheim, *International Law* 312 (H. Lauterpacht 8th ed. 1955); I. Brownlie, *supra* note 51, at 338-44; Clark, *Humanitarian Intervention: Help to Your Friends and State Practice*, 13 Ga. J. Int'l & Comp. L. 211 (1983) *But see* Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 Harv. Int'l L.J. 621 (1986).

Part of the controversy arises from the broad range of actions that may potentially be encompassed by the category of "humanitarian intervention." Many commentators both in the scholarly and popular media use the term in mixed meanings that variously may include or overlap with the concept of protection of nationals or counterintervention. Humanitarian intervention for present purposes treats these as separate justifications.

¹³⁷Reisman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in *Humanitarian Intervention and the United Nations* 167, 168-78 (R. Lillich ed. 1973). "The advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention." *Id.* at 171.

threat to world order, at least in the short term. The list of historical abuses associated with humanitarian intervention is long. One of the most notorious examples of attempting to justify the use of force by claiming humanitarian intervention was the Nazi invasion of Czechoslovakia in **1939**, which was purportedly carried out to protect "the life and liberty of minorities."¹³⁸ The United States has opposed, officially at least, this type of justification because of its potential for abuse.¹³⁹ The justification routinely requires a degree of factual inquiry and a final judgment that is frequently difficult, and sometimes impossible, due to the lack of reliable information and the shortness of time for decision making. The notorious cases, however, show that misuse of the humanitarian intervention justification is at least identifiable by the international community as an abuse of recognized norms.

Many states seem willing to consciously sacrifice the Charter goal of promoting minimal human dignity and justice in favor of minimal world order and avoidance of force in international relations.¹⁴⁰ Certainly the potential dangers of abuse call for well-defined criteria limiting humanitarian intervention. This concern and the unwillingness of states to accept a curtailment of their sovereign independence are the principal motives for state opposition to the doctrine. The practice itself continues, however, because it appears to be indispensable as an exceptional measure in emergency situations.¹⁴¹ The following limiting criteria delineate the circumstances under which humanitarian intervention would be lawful: (1) a specific, limited purpose of alleviating a grave threat to human rights; (2) a limited duration sufficient for the purpose of the mission; (3) a limited use of force necessary and proportional to the mission; and (4) a lack of any reasonable alternative action.¹⁴²

¹³⁸See I. Brownlie, *supra* note 51, at 340.

¹³⁹See Clark, *supra* note 136, at 212 (citing Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *Am J. Int'l L.* 275 (1973)). Clark notes, however, that the United States made a "somewhat half-hearted" claim of humanitarian intervention in the Dominican Republic in 1965. *Id.*

One commentator who conducted an analysis of the legal bases offered by the United States after the Grenada operation has suggested that the justifications offered for the intervention, specifically the request of the Governor-General and the Organization of the Eastern Caribbean States and the asserted need to protect nationals, actually were the less sustainable justifications on the facts. Instead, the realities supported a substantially better case for humanitarian intervention. See Levitin, *supra* note 136, at 650-51.

¹⁴⁰Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in *Humanitarian Intervention and the United Nations*, *supra* note 137, at 197, 219.

¹⁴¹*Id.* at 220.

¹⁴²Reisman & McDougal, *supra* note 137, at 184.

A major reason for the persistence of claims of humanitarian intervention is that the justification is grounded in the law on fundamental freedoms and the evolution of those principles. The same legal forces raising the need for greater emphasis on fundamental freedoms also diminish respect for the authority and legitimacy of governments responsible for repression. Humanitarian intervention, as a limited exception to Article 2(4), would be for the specific purpose of remedying serious and pervasive human rights abuses, using the minimum force necessary to accomplish that objective.¹⁴³ The right of self-determination and the enforcement of human rights would thus limit the claims of sovereignty by states already violating such a crucial international norm as that which protects the peoples those states represent.

C. THE CONTINUING SEARCH FOR PRINCIPLED DISTINCTIONS IN THE LAW

Difficult problems apparent in any study of insurgency are the level of the conflict and the uncertainty in the applicable rules of international law. Two conflicting principles under the U.N. Charter, of equal importance, are both trying to prevail: one prohibiting intervention and the use of force against a sovereign state; and the other dedicated to ensuring human rights and self-determination of peoples.¹⁴⁴ The prohibitions on unilateral intervention have become less absolute, because post-Charter law, which was originally contemplated as a security mechanism that would have obviated the need for unilateral measures,¹⁴⁵ has not been sufficiently effective.

The democratic states traditionally have not claimed a right to use force in support of democracy or human rights, however. They normally have invoked, instead, other justifications for their uses of force. Professor Schachter attributed this restraint to Article 2(4).¹⁴⁶ Humanitarian intervention was not a justification that the United States claimed in Grenada. The Grenada intervention, however, sug-

¹⁴³Levitin, *supra* note 136, at 652-53 (citing M. Walzer, *Just and Unjust Wars* 107-08 (1977)).

Genocide is the extreme of where humanitarian intervention would be appropriate. This recurrent horror was demonstrated as recently as Pol Pot in Cambodia and Idi Amin in Uganda.

¹⁴⁴Sohn, *supra* note 129, at 179.

¹⁴⁵Reisman, *supra* note 97, at 281. He notes that the consequence of a less effective collective security system has been a partial revival of the *jus ad bellum* standards needed to differentiate between lawful and unlawful conflicts between states. *Id.*

¹⁴⁶Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 *Yale J. Int'l L.* 261, 293 (1985).

gests something more about Article 2(4), and so do Nicaragua and Afghanistan. What they demonstrate is that there is an increasing tension that exists between the articulated reasons for policy decisions and the actual reasons for the actions taken.¹⁴⁷

The extent to which Article 2(4) in fact represents an accepted restraint under customary international law is, and will remain, an open question as one considers the actual uses of force by states and the lack of community response to breaches of Article 2(4).¹⁴⁸ The Charter also explicitly says self-determination and human rights are international norms to be protected. Resolution 2625 particularly emphasizes not just the right to self-determination, but also a right to assist peoples struggling for self-determination. This leads to a moral and practical dilemma. Although Professor Moore does not endorse humanitarian intervention as a justification for the support of insurgents, Professor Paust credits him as having observed that to do nothing in a given situation also may be to intervene. "Thus," says Paust, "the realistic question might not be whether to intervene but how."¹⁴⁹ These factors suggest a need to examine whether an alternative interpretation of Article 2(4) might better serve the Charter's goal of creating the conditions essential for international stability and well-being.

Between sovereignty and self-determination, the evolving intervention theories still have not reached the point of equilibrium. The consensus that does exist on insurgency and the limits of Article 2(4) actually leaves external support weighted in favor of preserving the inviolability of state sovereignty.¹⁵⁰ It protects the existing government by not being willing to confront the underlying issue of the desire for self-determination by the governed. On the results of this tension between sovereignty, under the traditional rules, and self-determination, as an emerging influence, Professor Sohn provided the following observations:

The emphasis in the United Nations in later years on the self-determination principle led it to a point of saying that it

¹⁴⁷D'Amato, *Nicaragua and International Law. The "Academic" and the "Real"*, 79 *Am J. Int'l L.* 657 (1985).

¹⁴⁸Rostow, *The Legality of the International Use of Force by and from States*, 10 *Yale J. Int'l L.* 286-87, 290 (1985).

¹⁴⁹Paust, *Conflicting Norms of Intervention: More Variables for the Equation*, 13 *Ga. J. Int'l & Comp. L.* 305, 307-08 (Supp. 1983).

¹⁵⁰See e.g., Schachter, *supra* note 146, at 291-93. Professor Schachter would permit intervention in defense of the political independence of a state, but rejects "the contention that force may be used unilaterally to achieve such laudable ends as freedom, self-rule and human rights." *Id.* at 293

is not only permissible, but even desirable, in fact necessary, for countries to come to the assistance of national liberation movements if they are fighting for the liberation of their country from foreign colonial domination or occupation by foreign forces. But even this approach does not go so far as to say that, simply because a government which is neither a foreign occupier nor a colonial government is oppressive, that [another] government is entitled to help the people liberate themselves.¹⁵¹

One can at least conclude that a limited degree of consensus exists in principle on the need for action to remedy genocide, apartheid, slavery, racism, and the unequal treatment of peoples generally.¹⁵² Professor Sohn, however, overlooked liberation from racist regimes, which are regimes not necessarily of foreign origin. The latter serve as one example of a purely internal source of instability with a potential for international significance. Whether peoples under oppressive domination, foreign or domestic, will actually be able to achieve political independence and stability for themselves under this limited approach without substantial external involvement is doubtful. In support of this conclusion, one needs only examine the extensive military support needed to force an end to the Soviet occupation of Afghanistan.

Even in situations involving a foreign occupier, international law is still struggling to articulate distinctions between such relatively straightforward situations as Afghanistan and Grenada. As Michael Levitin observed, the Afghans shot back and the Grenadians did not.¹⁵³ This states the difference somewhat simplistically, but it does recognize an important distinction between the two conflicts. "To distinguish between lawful and unlawful interventions," Levitin concludes, "the international community ought assign juridical signif-

¹⁵¹Sohn, *supra* note 129, at 179. Professor Sohn offers the following as a "very modest" rule: "No military intervention by one state is permissible except in an extreme emergency requiring instant response and subject to immediate termination of such emergency action on the request of the United Nations or an appropriate regional organization." *Id.* at 230.

A significant degree of uncertainty would remain under the rule. Responsibility would devolve first to the individual state to determine whether such an emergency exists. The organization then would have to apply an objective standard as to whether the use of force was appropriate under the particular circumstances.

¹⁵²Hazard, *The Role of the Eastern Bloc and the Third World*, 9 GMU L. Rev. 6, 10 (1986).

¹⁵³Levitin, *supra* note 136, at 653. This is what he calls the "Liberation of Paris Principle: if the people throw flowers, the invasion is lawful; if they throw anything else it is not." *Id.* at 654. On the justifications for U.S. humanitarian intervention in Grenada, see *supra* note 139.

inance to the [affected] state's citizens."¹⁵⁴ Such a distinction is entirely consistent with the protection of a people's right to self-determination. Intervention must be governed by an objective standard, but the free exercise of that right by the people themselves must be viewed through their eyes.

If self-determination as a coequal principle is to have any meaning in the law on support of insurgents, it at least has to consider the legitimacy of a government in power, as viewed in the same way the people themselves perceive their government.¹⁵⁵ The issue becomes whether a use of force has been applied against the political independence of a government that has its legal basis grounded in the will of the governed. The issue also involves such factors as the status of the governed as a people, and the pervasiveness of state repression against fundamental freedoms.

As a criteria of lawful or unlawful use of force, the human factor ultimately is neither more vulnerable to abuse nor less susceptible to objective assessment within the international community than other justifications that also must be tested against necessity and proportionality. Lawrence Pezzullo, former ambassador to Nicaragua and Uruguay, believes that the international community and the United States have proven they can successfully achieve self-determination for peoples through peaceful resolutions to internal conflicts. But, he warns, achieving stability in internal disputes that have reached crisis proportions depends on accommodating a process of popular reform. "How one overcomes the question of legitimacy is important to the attitude that will affect American decision makers faced with that type of crisis situation."¹⁵⁶

111. DOMESTIC CONSTRAINTS ON U.S. POLICY IN SUPPORT OF INSURGENTS

Much of the criticism currently directed against United States policy on the support of insurgents stems from the perception that greater weight is accorded the constraints and exigencies of political realities than to a concern for the principles of international law.¹⁵⁷ The

¹⁵⁴*Id.* at 651.

¹⁵⁵See Pezzullo, *Intervention in Internal Conflict: The Case of Nicaragua*, 13 Ga. J. Int'l & Comp. L. 201 (Supp. 1983).

¹⁵⁶*Id.* at 202-03.

¹⁵⁷See, e.g., Beres, *Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America*, 14 Den. J. Int'l L. & Pol'y 76 (1985); Falk, *The Decline of Normative Restraint in International Relations*, 10 Yale J. Int'l L. 263 (stating that a more "law oriented foreign policy" would contribute to security.); Friedlander, *Confus-*

controversies surrounding the withdrawal of the United States' consent to jurisdiction of the International Court of Justice in the Nicaragua case and the disclosure of funds secretly diverted to the Contras illustrate this widespread perception. A clear implication from both events is that international law is but one of many significant elements that affect the decisions of our foreign policy makers.

The relative emphasis indeed seems to be on factors other than international law. In the area of insurgency support, U.S. policy particularly seems to be guided more by domestic constraints and our own view of our political position in the world. The purpose of discussing these issues here is to consider what those domestic political and legal constraints are, how they compare with the constraints of the international legal structure, and how the domestic constraints can be made to interrelate with the emerging principles of international law.

A. CONTEMPORARY POLICY DOCTRINES ON THE SUPPORT OF INSURGENTS

1. The Process of Policy Making

One of the gravest concerns about U.S. support of insurgents is the potential for becoming militarily committed to a futile expenditure of national resources resulting from a lack of well-conceived policy decisions. In the combined crush of international events and domestic concerns under which foreign policy decisions must be made, the interrelation of law with events often slips from view. The decision maker typically must first identify the problem and make an initial assessment of its nature. The response by the decision maker involves certain expectations—expectations about the political or military power available to implement policy; the potential costs, including the destructiveness of a possible use of force; the effectiveness of achieving goals in compliance with the discernible rules of law; and the likelihood of organized world community intervention in response.¹⁵⁸

ing Victims and Victimizers: Nicaragua and the Reinterpretation of International Law, 14 Den. J. Int'l L. & Pol'y 87 (1985); Malawer, *Reagan's Law and Foreign Policy, 1981-1987: The "Reagan Corollary" of International Law*, 29 Harv. Int'l L.J. 85 (1988) (describing "an attempt to pressure the international legal system into changing in a manner beneficial to United States interests.").

¹⁵⁸M. McDougal & F. Feliciano, *supra* note 60, at 45-49. Professors McDougal and Feliciano provide a reminder that who the actual decision maker becomes will depend on how and when the particular problem arises. "Conspicuous among decision-makers is, of course, the military commander who must on occasion, at least in the first instance, pass upon the lawfulness both of his own proposed measures and of measures being taken against him." *Id.* at 48 (footnote omitted).

One then begins a problem solving approach designed to seek out the expertise and resources needed to meet the crisis. The more compelling the threat, the more ad hoc the process may become. As the urgency increases, so too will the immediate response more directly reflect the exclusive perspective of the people whose views or expertise have dominated the process. The longer the crisis lasts or the more frequently it recurs, the less likely the policy maker will be to anticipate and prepare for the next problem of a different character.

A former senior State Department official has commented on the tendency to isolate staff legal counsel from decision making on matters of what he refers to as "high politics" and "high policy."¹⁵⁹ He described the problem this way:

Particularly since the latter part of the nineteenth century, the efforts of diplomats and states to establish clear norms for the conduct of international relations in [their] "ordinary affairs" have been remarkably successful. . . . Yet there is another dimension to U.S. foreign policy where international law rarely receives more than peripheral consideration. Crisis management, high-stakes political and economic conflict, and national security policy attracts constant and visible attention from senior decisionmakers who weigh domestic politics and foreign policy in the face of heavy public scrutiny. Their political calculations rarely invoke international law as a principle guide to action.¹⁶⁰

"Crisis diplomacy" is characterized by reacting to events only after they occur. It was the same intractable dilemma facing an American president nearly twenty years ago, after he had promised to eliminate reactive decision making from the foreign policy process of a nation then deeply embroiled in a foreign war of insurgency. On December 2, 1968, then President-elect Richard Nixon, introducing his choice of Henry A. Kissinger as Assistant for National Security Affairs, charged him with this task of regaining control over a reactive policy process.¹⁶¹ From that point, Kissinger began to institutionalize a conceptual framework of strategic thought that remains a major part of foreign policy planning today.

In his earlier writings,¹⁶² Kissinger had emphasized the impor-

¹⁵⁹Kreisberg, *Does the U.S. Government Think That International Law is Important?*, 11 *Yale J. Int'l L.* 479, 485 (1986). Paul H. Kreisberg served as Deputy Director, Policy Planning Staff, U.S. Department of State, from 1977 through 1981.

¹⁶⁰*Id.* at 479-80.

¹⁶¹M. Kalb & B. Kalb, *Kissinger* 26 (1974).

¹⁶²The paragraph that follows draws on H. Kissinger, *Nuclear Weapons and Foreign Policy*, 120-27, 246-50 (1969) (originally published in 1957).

tance of thinking conceptually in foreign policy because the sheer complexity of technical problems had outpaced the bureaucratic process. Each problem, he said, was dealt with on its own merits, emphasizing details at the expense of the larger conceptual framework. This in turn, he concluded, has led to a lack of purposefulness and flexibility in dealing with regional conflicts. Both sides of the conflict, in his view, must understand not only what national interests and risks one's own side has at stake, but those of the other side as well. Limited wars especially must have well-conceived strategic objectives that necessarily have not only a military focus, but a political dimension as well.¹⁶³ This requires that a decision to use force complement the goals of both aspects.

2. *The Balance of Power Theory*

The classic expression of the historical lesson that no world order is safe without physical safeguards against aggression is the search for stability through a balance of power.¹⁶⁴ International order under this concept recognizes an indispensable relationship between power and security on the one hand, and morality and legitimacy (meaning general acceptance) on the other.¹⁶⁵ The central idea is that no one of these principles is sufficient alone to preserve the world order.

The balance of power among states themselves cannot preserve international stability without a basis of political legitimacy, because revolutionary dissatisfaction will become inevitable. People tend to evaluate foreign relations and foreign policy in terms of their own domestic standards of justice. Thus, the legitimizing principles on which the international order is based must be broad enough to encompass a general acceptance of community values to ensure that state relations do not ultimately return to an exclusive reliance on the use of force.¹⁶⁶ There is also likely to be a gap between the reali-

¹⁶³"Limited war" in its broad meaning can be defined as military conflict in which the participants respect reciprocal limits on those actions directed toward clearly established objectives that are susceptible to negotiated settlement in order to minimize the aggregate destruction of mutually shared values. M. McDougal & F. Feliciano, *supra* note 60, at 55.

See also H. Kissinger, *American Foreign Policy*, 117-18 (1969) (stating that the decline of U.S. predominance in physical resources and political power requires a prioritization of limited means to achieve carefully defined ends).

The assertion that the use of force must be consistent with political needs does not necessarily equate to the Clausewitz formula that force is the tool of political needs. Political consideration must be given to international norms as well as national interests.

¹⁶⁴H. Kissinger, *A World Restored* 317-18 (Sentry ed.) (originally presented as a doctoral dissertation in 1954).

¹⁶⁵*Id.* at 318.

¹⁶⁶*Id.* at 328.

ties of international power and domestic expectations about a national foreign policy. The statesman must be able to obtain the support of a domestic consensus on the legitimacy of the underlying principles that can embrace a realistic balance of power.¹⁶⁷

The balance of power theory is consistent with post-Charter principles designed to control reliance on the use of force. The theory seeks to protect the status quo against external attempts to alter it unilaterally through the "illegitimate" use of force by either direct or indirect means.¹⁶⁸ The Charter principles are effective as a basis for world order only so long as the principles may be interpreted in a way that preserves their perceived legitimacy and also enables the attainable international consensus to be achieved domestically.¹⁶⁹

The use of force and human rights in the Central American insurgencies provide a current example of the need to reconcile these principles with domestic and international perceptions of what constitute legitimate policy objectives. President Reagan's Commission on Central America, the Kissinger Commission, observed that two basic U.S. goals are potentially in opposition in the region: the need to defend fundamental security interests, and the promotion of respect for democratic government and human rights.¹⁷⁰ Purely indigenous reform movements, even indigenous revolutions, should not pose a problem of policy for the United States.¹⁷¹ Externally supported insurgency can become a threat to both security and to democratic reforms, however. A successful U.S. policy on insurgency, like an effective rule of international law, can and must be able to reconcile these two values in a way that will make them mutually reinforcing. Restraints on force and respect for human rights, therefore, are widely perceived to be equally legitimate norms, from both a domestic and international perspective.

The critics of the balance of power theory believe that the key to stability in international politics does not lie in military power, but rather in other sources of power.¹⁷² This view explains instability in terms of changing populations, increasing political organization, and

¹⁶⁷*Id.* at 326.

¹⁶⁸Perkins, *supra* note 125, at 181. See also *supra* note 128 and accompanying text. See generally J. Perkins, *The Prudent Peace: Law as Foreign Policy* (1981); Vagts & Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 *Am. J. Int'l L.* (1979).

¹⁶⁹See H. Kissinger, *supra* note 164, at 328.

¹⁷⁰Report of the National Bipartisan Commission on Central America 103-04 (January 1984) [hereinafter Kissinger Commission Report].

¹⁷¹*Id.* at 84.

¹⁷²See, e.g., A. Organski, *supra* note 82, at 272-99, 338.

economic development—the same factors associated with rising nationalist movements.¹⁷³ Regardless of whether the balance of power theory is adequate to explain the sources of instability, it has proven to be a widely influential conceptual framework, useful in limited respects, and it must be applied with an adequate appreciation of its limitations.¹⁷⁴ As will be seen later, this balance of power concept provides the underpinnings for the Reagan and Brezhnev Doctrines, which specifically affect current policies on insurgency support.

3. Soviet Doctrine on Support of Wars of National Liberation

One of the greatest challenges to international law has come from the Soviet Union and its Eastern European client states, often referred to as the Second World.¹⁷⁵ Only gradually, in recent years, has the Soviet Union begun to accept traditional principles as customary international law. This acceptance, however, has been highly selective, permitting the Second and Third Worlds the opportunity to band together in various General Assembly resolutions to make new law on key issues, including insurgency support.¹⁷⁶ All three worlds agree that international law protects human rights, especially where large-scale violations occur. Notwithstanding the Helsinki Accord, there is still more support in the First World for the recognition of individual rights.¹⁷⁸

In light of state practice, however, the consensus is less clear. Under the justification of the Brezhnev Doctrine, the Soviet bloc nations have imposed and maintained communist regimes through the occupation and control of Eastern Europe and Afghanistan, and have directly intervened by force to encourage and support wars of national liberation in Africa, Asia, and Latin America. The Soviet bloc has supported Third World revolution and radical movements to fulfill its presumed international duty of advancing the world cause of Marxism.¹⁷⁹ This has long been viewed as a global threat, from the

¹⁷³See *supra* note 82 and accompanying text.

¹⁷⁴See A. Organski, *supra* note 82, at 273, 295.

¹⁷⁵Hazard, *supra* note 152, at 6.

¹⁷⁶*Id.* at 8-9. See also *supra* note 73 and accompanying text.

¹⁷⁷See *supra* note 23 and accompanying text.

¹⁷⁸Hazard, *supra* note 152, at 10.

¹⁷⁹The Soviet Union has supported so frequently the idea of national liberation wars that it can hardly now reject self-determination as a lawful basis for action by the international community. See Reisman, *supra* note 10, at 908-09. Professor Reisman notes that the reservations expressed by some states about introducing national liberation principles into international law derive from Soviet practices that make the concept appear supportive only of totalitarian expansion. "National liberation" need not be one-sided if applied by the international community, and particularly by the General Assembly, in a "responsible and even-handed fashion, consistent with the basic principles of the United Nations Charter." *Id.* at 909.

U.S. perspective, to the balance of power and world stability.¹⁸⁰

Significant signs of a Soviet reversal on the Brezhnev Doctrine, however, have been observed in some specialized studies over the last decade by those scholars who see grave Soviet doubts about the continued wisdom of linking radical nationalistic aspirations with Marxist ideals.¹⁸¹ A Soviet policy reassessment, it has been said, has led to a shift in which the Soviets will continue to provide economic aid, training, and, to a lesser extent, military assistance.” One no longer hears expansive promises of military and economic support for the so-called liberated countries, which now must pursue development “mainly through their own efforts.”¹⁸³

Some evidence of the need for the Soviet Union to rethink its own criteria for the support of insurgency lies in the irony that established pro-Soviet Marxist regimes have themselves come under indigenous insurgent attack that forced Soviet-backed troops into counterinsurgency roles in Afghanistan, Nicaragua, Angola, Mozambique, Cambodia, and Ethiopia.¹⁸⁴ According to this view, there also exists within the Soviet experience on the support of insurgents a lesson for the United States in the same area:

Moscow is revising its ambitions because of the demonstrable failure of its political and economic model for guiding, changing, and dominating the Third World. Although it has a few military footholds in the Third World—mainly through its military assistance—these are not enough to en-

¹⁸⁰Valkenier, *New Soviet Thinking About the Third World*, 4 World Pol’y J. 651 (1987).

¹⁸¹*Id.* at 654, 662. See also Brown, *Change in the Soviet Union*, 64 Foreign Aff. 1048, 1060-63 (1986). But see Simes, *Gorbachev A New Foreign Policy?*, 65 Foreign Aff. 477, 487 (1987). Simes states that the Brezhnev Doctrine is still “very much part of Gorbachev’s policy.” *Id.* at 487. Graham T. Allison, Jr., Dean of the John F. Kennedy School of Government, also has sounded a cautionary note. The Soviets’ withdrawal from Afghanistan and initial steps toward a settlement in Angola are among the positive signs of an emerging opportunity for the West, he wrote. But in regard to events in Central America, he was less optimistic:

Soviet actions fly in the face of every implication of Gorbachev’s words. Specifically, Moscow’s shipment of arms and other military equipment to the Sandinista government of Nicaragua and to guerillas in El Salvador and Guatemala has continued without pause, and indeed increased in the first quarter of 1988. Soviet-bloc economic and military aid to the Sandinistas is estimated at almost \$1 billion annually.

Allison, *Testing Gorbachev*, 67 Foreign Aff. 18, 27-28 (1988).

¹⁸²See Fukuyama, *Gorbachev and the Third World*, 64 Foreign Aff. 715 (1986).

¹⁸³*Id.* (quoting from the report of General Secretary Mikhail Gorbachev at the 27th Party Congress of the Soviet Union, October 1985).

¹⁸⁴*Id.* at 720.

sure lasting influence. By contrast, U.S. economic power, cultural openness, and tolerance of political diversity have long been our greatest assets. If our competition with the Soviet Union is conducted on these grounds, rather than on military grounds, we have nothing to fear, except perhaps our own poor judgement.¹⁸⁵

If the Soviet Union's focus is indeed moving away from anticipating the inevitability of world wide military struggle between the communist and capitalist nations, there remains the question of how the United States and its allies will respond to the shift.¹⁸⁶ The first step is to verify that the evidence establishes an actual substantive strategic change, rather than indicating mere tactical rhetoric.¹⁸⁷ The next step is to reduce our reliance on the balance of power's view of world order that sees all Soviet gains as American losses. This could tend to lead us into an unnecessary, reactive use of military force in localized conflicts.¹⁸⁸

4. *The Reagan Doctrine on Support for Freedom Fighters*

The Reagan Doctrine on the support of those insurgents fighting to regain democratic control of governments from communist dictatorships is more than a mere refinement of primarily defensive containment policies under past presidential doctrines.¹⁸⁹ President Reagan, in effect, announced the policy during his State of the Union

¹⁸⁵Valkenier, *supra* note 180, at 672.

¹⁸⁶McGwire, *Update: Soviet Military Objectives*, 9 World Pol'y J. 723, 730 (1987).

¹⁸⁷*Id.* at 731. For the argument that the current Soviet statements and actions are tactical, see generally Simes, *supra* note 181. Simes concludes:

All in all, Soviet geopolitical maneuvering under Gorbachev has demonstrated a new sense of purpose, a new realism and a new creativity. What it has not demonstrated is any kind of turn inward, any evidence that Gorbachev and his colleagues are scaling down Soviet global ambitions in order to concentrate on domestic economic modernization. Nor has the Soviet Union shown any hesitation to use force to accomplish its objectives or, for that matter, any reluctance to support governments charged with terrorism.

Id. at 491.

¹⁸⁸*See id.* See also Beres *supra* note 157, at 85 (stating that "(t)he central problem lies in [the United States'] identification of East/West competition as the only meaningful axis of global conflict").

¹⁸⁹Rosenfeld, *The Guns of July*, 64 Foreign Aff. 698-99 (1986) (citing at 698 n.1 a list of sources analyzing and evaluating the Reagan Doctrine). See also Layne, *The Real Conservative Agenda*, 61 Foreign Pol'y 73 (1985-86). The past presidential containment doctrines, says Layne, recognized the strategic and economic limitations that required the United States to more realistically assess its interests and redefine its commitments abroad, in a way that the Reagan Doctrine, literally construed, fails to adequately address. *Id.* at 73-83.

Address of February 6, 1985. As early as 1981, however, commentators had perceived, even under the Carter Administration, a new U.S. willingness to set aside post-Vietnam insecurities and revive preparedness for Third World military intervention as a policy option.¹⁹⁰

The Reagan Doctrine was basically developed as a response to the Brezhnev Doctrine, which seemed to put Marxist regimes beyond democratic challenge no matter how unrepresentative of popular will.¹⁹¹ One criticism of the Reagan Doctrine is that it commits the United States to promises of military support that have no natural limits.¹⁹² This has not proven to be a significant problem in practice, because the Reagan Administration has exercised some restraint, for example, by resisting pressure to initiate U.S. support for rebels in places such as Mozambique and Angola.¹⁹³

The Reagan Doctrine has also been characterized as an "American Brezhnev Doctrine," equally violative of international law. At least to the extent that the policy is directed at totalitarian regimes and offsetting Soviet-initiated interventions in internal conflicts, the appellation is actually flawed in its analogy. In those particular situations where Soviet power is being projected abroad to impose or to secure Marxist regimes against national self-determination, the use of force in counterintervention would be a lawful response to Soviet external aggression under counterintervention as a justification.

Another potential justification for the Reagan Doctrine is that of humanitarian intervention. Humanitarian intervention was offered as an initial, but later muted, legal basis for the Reagan Doctrine.¹⁹⁴ In his 1988 State of the Union Address, President Reagan invoked American support on behalf of freedom fighters everywhere in what he broadly described as a "global democratic revolution."¹⁹⁵

¹⁹⁰E.g., Schwenniger, *The 1980's: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 Rutgers L. Rev. 423, 426 (1981). Schwenniger noted that the Brezhnev Doctrine, as reflected in the Soviet invasion of Afghanistan, and the Carter-Brown Doctrine on the protection of resources in the Trilateral World, as reflected in the creation of the Rapid Deployment Force, together demonstrated the lack of super-power respect for the equal sovereignty of smaller Third World nations. *Id.* at 423.

¹⁹¹*Id.* at 700. See also Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 Va. J. Int'l L. 621, 634 (1985).

¹⁹²See Layne, *supra* note 189, at 704.

¹⁹³See Rosenfeld, *supra* note 189, at 704.

¹⁹⁴Beres, *supra* note 157, at 77.

¹⁹⁵In the address, the President made a call for Americans to become for emerging democracies "what Lafayette, Pulaski, and von Stueben were for our forefathers and the cause of American independence." He also expanded on the theme of assistance to burgeoning world democracy:

A different criticism levelled against the Reagan Doctrine is that it has a single-minded focus on anticommunism that has concentrated its application to Marxist totalitarian regimes and virtually ignored the universal desire for freedom from all forms of tyranny.¹⁹⁶ This concern was alleviated in large part in early 1986 by the President's more even-handed statement to Congress, promising to "oppose tyranny in whatever form, whether of the left or the right."¹⁹⁷

Former Secretary of State Cyrus Vance, writing in 1986, used Afghanistan as an example of a conflict in which the United States properly aided the insurgents, because the intervention clearly promoted a balanced approach to both human rights and U.S. interests.¹⁹⁸ "It is critical to note that in supporting the Afghan rebels," he added, "Americans are not merely supporting an anticommunist rebellion. The United States is vindicating universal principles of international law and helping the Afghan people to determine their own future."¹⁹⁹ As Vance also warned, "Americans must recognize that anticommunism cannot always be equated with democracy."²⁰⁰ Anticommunism alone does not justify support to insurgents, nor does the pursuit of democracy and human rights always justify American use of force.²⁰¹ Yet, self-determination and human rights should never be off the political agenda. It is on this basis, rather than by force, that we can best distinguish what the United States has to offer the world from the Soviet's aggressive, totalitarian

But not just Nicaragua or Afghanistan; yes, everywhere we see a swelling freedom tide around the world—freedom fighters rising up in Cambodia and Angola, fighting and dying for the same democratic liberties we hold sacred. Their cause is our cause: freedom. . . .

. . . .
 . . . As the global democratic revolution has put totalitarianism on the defensive, we have left behind the days of retreat—America is again a vigorous leader of the free world, a nation that acts decisively and firmly in the furtherance of her principles and vital interests.

Wash. Post, Jan. 26, 1988, at A10, col. 1.

¹⁹⁶See Rosenfeld, *supra* note 189, at 702. See also Beres, *supra* note 157, at 77-78; Vance, *The Human Rights Imperative*, 63 Foreign Pol'y 3, 11 (1986).

¹⁹⁷See Jacoby, *The Reagan Turnaround on Human Rights*, 64 Foreign Aff. 1066-67 (1986) (quoting from the presidential address to Congress in March 1986). Jacoby also notes that the reassuring words on human rights had been immediately preceded by the Administration's assistance in the ouster of two right-wing dictators, Presidents Marcos from the Philippines and Duvalier from Haiti. More recently, the Administration applied pressure on Panamanian dictator Manuel Noriega to relinquish powers. See Wash. Post, Mar. 19, 1988, at A1, col. 5.

¹⁹⁸Vance, *supra* note 196, at 10-11.

¹⁹⁹*Id.*

²⁰⁰*Id.* at 11.

²⁰¹Solarz, *When to Intervene*, 63 Foreign Pol'y 20, 37 (1986).

alternative.²⁰² The focus must remain, however, on alleviating such repression and forcible external domination.

President Reagan has repeatedly defended the lawfulness of the doctrine. "Support for freedom fighters is self-defense," President Reagan said in his 1985 State of the Union Address. It was less a literal statement of the law than an expression of how the law should be able to serve certain basic national policy interests, including security needs. In its continuing search for principled distinctions, international law has had to strive to overcome its own perception problems concerning its relevance to state policy making in the area of insurgency intervention.²⁰³ One commentator has said that the perceived need for a greater degree of responsiveness to political logic and security imperatives may underlie part of the resistance to post-Charter rules on nonintervention.²⁰⁴ The Reagan Doctrine generally reflects this view that, in the conduct of international affairs as a whole, intervening force is an indispensable means of protecting rights and achieving order.

Although the Reagan Doctrine invokes moral principles that are consistent with the emerging international law on the use of force in counterintervention and humanitarian intervention, the administration's articulations of the doctrine seem calculated overall to bridge a perceived gap between law and policy. The gap appears widest in the particularly difficult area involving human rights. By failing to recognize the significance of humanitarian concerns in the law on intervention, as it is already afforded in other expressions of international community norms, international law has failed to maintain its essential congruency with its own moral basis.²⁰⁵ The natural consequence is that, in the absence of collective remedies, the United States and other states increasingly begin to act unilaterally to assist self-determination and protect fundamental human rights, while the external decision makers articulate their own justifications.²⁰⁶ As

²⁰²Vance, *supra* note 196, at 12-17.

²⁰³See R. Vincent, *supra* note 78, at vii. See also Beres, *supra* note 157, at 76-77.

²⁰⁴See J. Perkins, *supra* note 125, at 226. Perkins, in the context of counterintervention, states that:

A misunderstanding with potentially tragic consequences seems to persist in the minds of many. This is the conception that realists have to make a choice between the rule of law and the hard policy decisions necessary to deal with the realities of power and contention. This, I submit, is a misconception. The law evolves out of these realities.

Id.

"Levitin, *supra* note 136, at 651.

"See Beres, *supra* note 157, at 77-78.

Professor Reisman has observed, "[t]he international political system has largely accommodated itself to the indispensability of coercion in a legal system, on the one hand, and the deterioration of the Charter system, on the other, by developing a nuanced code for appraising the lawfulness of individual unilateral uses of force."²⁰⁷ If it has achieved nothing more, the Reagan Doctrine has at least served notice on the international order that the United States will not stand idle in the face of externally supported repression.

B. U.S. DOMESTIC LEGISLATIVE CONTROLS ON INSURGENCY SUPPORT

U.S. national interests are circumscribed to a significant degree by the domestic legislative controls on insurgency support, security assistance, and covert activity. Michael Matheson, in his position as a State Department legal adviser, has pointed out that domestic legislation represents certain practical considerations that must be taken into account in foreign policy making in the area of intervention.²⁰⁸ First, a government that is considering foreign military support must work generally within the confines not only of international law, but also domestic laws and procedures.²⁰⁹ Second, military assistance relationships can be, and often are, used to apply leverage ensuring compliance with international norms, particularly those norms on human rights and humanitarian conduct.²¹⁰

U.S. policy makers, and Western governments in general, also undergo intensive lobbying pressure from numerous international human rights interest groups, such as Amnesty International, Americas Watch, Helsinki Watch, and others. The impact of these groups combines with the efforts of various influential national human rights organizations, as well as with the nonpolitical activities of national and international relief organizations. The result is that national policy tends to reflect this international and domestic concern for human rights. The United States should recognize, however, that the pursuit of human rights norms in foreign policy is actually very much consistent with its own national values and interests.²¹¹

²⁰⁷Reisman, *supra* note 97, at 280.

²⁰⁸See generally Matheson, *Practical Considerations for the Development of Legal Standards for Intervention*, 13 Ga. L. Int'l & Comp. L. 205 (Supp. 1983).

²⁰⁹*Id.* at 206.

²¹⁰*Id.* at 208.

²¹¹Vance, *supra* note 196, at 7. Cyrus Vance, as a former member of the Carter Administration, referred to criticism of that Administration's emphasis on human rights in U.S. foreign policy. No foreign policy, Vance wrote, can obtain the support of the American people unless it reflects their own respect for human dignity and freedom, but practical judgments on policy are required too. *See id.*

1. Current Congressional Legislation and Oversight

Congress has enacted an extensive framework of legislative restrictions and oversight mechanisms designed to control the use of military force abroad. While it is beyond the scope and purpose of this article to analyze these in detail,²¹² the more significant elements will be identified for a discussion of a trend in domestic law toward increased humanitarian aid in support of insurgents.

a. The War Powers Resolution

The most well-known and controversial congressional attempt to legislatively restrict the use of force by a president, the 1973 War Powers Resolution,²¹³ was itself precipitated by U.S. involvement in an undeclared insurgent war. The purpose of the resolution is to ensure presidential notification to Congress before the introduction of United States "armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." After every such introduction the President "shall consult regularly with the Congress."²¹⁴ The reporting requirement then triggers a sixty-day time limit (extended an additional thirty days for "unavoidable military necessity respecting the safety of United States Armed Forces") within which time the President must terminate the engagement of forces, absent an armed attack or a specific enactment by Congress.²¹⁵ No authority for such introduction of U.S. armed forces shall be inferred, except under specific authority of U.S. law permitting the introduction of forces into hostilities or implementing treaty provisions to that effect.²¹⁶ The same section defines those forces to include members used "to command, coordinate, participate in the movement of, or accompany the regular or *irregular* military forces of any foreign country or government."²¹⁷

How the pursuit of human rights in foreign policy can coincide with other U.S. national interests may be seen in the recent superpower summits. As Dean Allison observed, "While Gorbachev bristles at the West's persistent demands regarding human rights for Soviet citizens, President Reagan's firm pursuit of this issue at the [1988] Moscow summit did nothing to dampen progress in other areas. The United States should keep pushing Moscow on human rights across the board." Allison, *supra* note 181, at 29.

²¹²Michael J. Matheson, Deputy Legal Advisor for the Department of State, has authored a more complete analysis of this subject of domestic security interests and legislation. The book is presently pending publication.

²¹³*See* War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986).

²¹⁴*Id.* § 1542.

²¹⁵*Id.* § 1544(b).

²¹⁶*Id.* § 1547(a).

²¹⁷*Id.* § 1547(c) (emphasis added).

Despite presidential protestations, no U.S. president has actually challenged the constitutionality of the War Powers Resolution by actually refusing to make reports, and in fact, they have grudgingly provided carefully worded reports “consistent with” the resolution.²¹⁸ The resolution does strike at the heart of the separation of powers between the executive and legislative branches in the area of foreign policy, declarations of war, and the duties of the commander-in-chief.²¹⁹ The constitutional dispute between the executive and legislative branches is one that the judiciary prefers to side-step as a political question.²²⁰ For the foreseeable future, the War Powers Resolution represents a significant constitutional foothold for Congress in the area of presidential discretion to use U.S. forces to support irregular military forces in a foreign country.

b. Security Assistance Legislation

Military aid and security assistance are the means by which Congress routinely controls U.S. military support abroad through its firm grip on the power of the purse. This body of domestic legislation consists principally of the Foreign Assistance Act (FAA),²²¹ the Arms Export Control Act (AECA),²²² and annual budgetary legislation, in-

²¹⁸See Javits, *War Powers Reconsidered*, 64 Foreign Aff. 130, 133-34(1985). See also Cranston, *Revise the War Powers Act*, Wash. Post, Oct. 22, 1987, at A23, col. 1. Senator Cranston argued that the War Powers Resolution permits the President to commit troops before the reporting requirement is triggered, if indeed it is triggered at all. He urged that all “nonemergency” deployments should be joint legislative-executive decisions. “As we have seen,” wrote Senator Cranston, “Congress has proven reluctant to press for the withdrawal of troops once deployed — however ill-advised the deployments might be.”

²¹⁹See generally R. Turner, *The War Powers Resolution: Its Implementation in Theory and in Practice* (1983). Turner makes the argument that the resolution is unconstitutional, ineffective, and fails to serve U.S. national security interests. *But see* Henkin, *Foreign Affairs and the Constitution*, 66 Foreign Aff. 284 (1987). Professor Henkin has noted that the War Powers Resolution is but one illustration of Congress regaining a measure of power that it had unnecessarily ceded to presidential discretion early in U.S. history. He stated that “Congress has been more successful when it has argued, not constitutional limits on the president’s initiatives, but rather the breadth of its own powers, and their supremacy.” *Id.* at 294-95.

²²⁰See generally Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 Harv. Int’l L.J. 155 (1985). See also Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 Stanford L. Rev. 1543 (1988).

²²¹22 U.S.C. §§ 2151-2429 (1982 & Supp. IV 1986). The Foreign Assistance Act (FAA) includes four major grant programs: the Military Assistance Program, International Military Education and Training, Antiterrorism Assistance, and the Economic Support Fund. The FAA also authorizes assistance to friendly nations and international organizations for peacekeeping operations.

²²²22 U.S.C. §§ 2751-2796 (1982 & Supp. IV 1986). The Arms Export Control Act (AECA) provides for the Foreign Military Sales Program. This program governs all sales of “defense articles” and “defense services.” Defense services is defined as to also control the sale of all forms of training.

cluding the defense and foreign assistance authorization and appropriation acts. The FAA is the most significant statute on security assistance because of the comprehensive grant programs it provides. The AECA limits the sale and transfer of defense articles and services abroad, prohibiting grants or trades apart from the specific grant programs. The AECA specifically prohibits U.S. personnel from performing any defense services of a combatant nature.²²³

Emphasizing the significance of security assistance legislation, Matheson made this observation:

These pieces of legislation make it quite clear that assisting foreign countries in providing for their internal security is a proper object of United States security assistance. In the context of these statutes, internal security refers to violence of an internal character above the level of ordinary law enforcement tasks. However, other statutes place restrictions on situations in which such assistance may be provided. The most prominent restriction is in the area of human rights.²²⁴

Security assistance programs are lawful under traditional principles permitting assistance to established governments for the purposes of providing security from external aggression and providing police enforcement to quell the lowest category of internal disorder. As seen in the previous discussion on external support to states requesting assistance, this foreign assistance to a state generally remains lawful until an internal disorder has reached the point that an insurgent group challenging the constituted government has achieved some degree of internationally recognizable status.²²⁵

²²³22 U.S.C. § 2761(c) (1982 & Supp. IV 1986).

²²⁴Matheson, *supra* note 208, at 206.

²²⁵*See supra* note 51 and accompanying text. *See also* Sohn, *supra* note 129, at 227-28. Professor Sohn summarized what he called "fuzzy" rules on the gradations of assistance on behalf of a constituted government, which are set forth here in order of increasing permissibility:

- 1) "limited military action" in a foreign country during a large-scale internal conflict;
- 2) transporting personnel, equipment, and supplies;
- 3) intelligence observation and reporting;
- 4) military planners and advisers, not engaged in fighting and equipped only with side-arms for personal self-defense. (By inference, these would include in-country military trainers);
- 5) military training provided in one's own country to the forces of the supported government;
- 6) "preventive" security assistance prior to a crisis conflict; and
- 7) arms grants and sales, which he recognizes to be a very common practice among medium and major powers.

He also notes that these are provided clandestinely by different countries to varying

In contrast to the support of a government under the traditional principles of international law, there is no authority for security assistance programs specifically providing military aid to an opposition group at any level of internal conflict. What has become an increasingly common practice, however, is the rendering of security assistance to a friendly government in a state that is either sympathetic to, or actively assisting insurgents fighting in a bordering state. Consider in this regard the following statement by Assistant Secretary of State Elliot Abrams, characterizing U.S. aid to Honduras as an augmentation of Contra support:

Our assessment is that we can and must help the democracies to develop through economic and security assistance, but that only pressure applied directly to Nicaragua can produce gains that will decrease the risk of Soviet and Cuban domination of Central America. If we are correct in this assessment, and experience suggests that we are, then the alternative to our current two-track policy of support for the resistance and negotiations would be to further shore up Nicaragua's neighbors against Sandinista aggression. The alternative approach would be very difficult and would carry at best limited assurances that it could work.²²⁶

The grant programs under the FAA are administered by the Department of State under Title 22, to ensure consistency with broader U.S. foreign policy objectives. The FAA specifically contains human rights provisions that are designed to restrict the situations in which military aid can be provided.²²⁷ Section 660 prohibits training and support of foreign police forces and is designed to preclude U.S. assistance to foreign police forces practicing internal repression.²²⁸ This provision was originally aimed at states other than those established democracies with no standing army and which had no history of human rights abuses. Another key provision of the FAA, section 502B, requires, subject to suspension of aid, that security assistance be provided in a manner that encourages compliance with international hu-

degrees, but he makes no mention that this distinction should affect the lawfulness of the support. *See id.* at 229.

²²⁶*United States Policy Options with Respect to Nicaragua and Aid to the Contras: Hearings Before the Senate Comm. on Foreign Relations, 100th Cong., 1st Sess. 183 (1987)* (prepared statement of Elliot Abrams, Assistant Secretary of States for Inter-American Affairs).

²²⁷Congress also enacted parallel legislation to establish human rights criteria for programs of economic aid under section 116 of the FAA. *See* 22 U.S.C. § 2151n (1982 & Supp. IV 1986).

²²⁸22 U.S.C. § 2420 (1982).

man rights in the state receiving the aid.²²⁹ Matheson points out how the human rights provisions under the FAA have wider significance beyond U.S. policy:

Although this is just one national model for a description of the circumstances and limitations on involvement in foreign violent situations, it is a particularly relevant one for use, and should be considered as a starting point for the development of international standards in this area.²³⁰

Apart from issue-specific restrictions,²³¹ there are certain country-specific provisions that may fall into one of two categories. One category completely prohibits security assistance to Marxist²³² and radical²³³ regimes.²³⁴ Another category, which is found in various legislation,²³⁵ restricts full participation by certain countries,²³⁶ par-

²²⁹22 U.S.C. § 2304(a) (1982). This section provides, in relevant part:

(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. . . .

(3) In furtherance of paragraphs (1) and (2), the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

²³⁰Matheson, *supra* note 208, at 207.

See also generally Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 Am. J. of Int'l L. 246 (1982); Moeller, *Human Rights and United States Security Assistance*, 24 Harv. Int'l L.J. 75 (1983).

²³¹Other issue-specific restrictions have a much narrower focus, such as arrearages in debt to the United States, expropriations of U.S. property, and nuclear transfers.

²³²*See* 22 U.S.C. § 2370(f) (1982) (prohibition on assistance to communist countries).

²³³*See* 22 U.S.C. § 2371 (1982) (prohibiting assistance to governments providing sanctuary to terrorists).

²³⁴Such countries include Cuba, Nicaragua, and Libya. Other examples include Angola, Cambodia, Laos, Vietnam, Syria, Iraq, and South Yemen.

²³⁵Some of the specific provisions are found in the general legislation already discussed. Other examples appear in annual and supplemental appropriations acts, and in the various International Security and Development/Assistance Acts.

²³⁶Such legislation presently affects El Salvador, Argentina, Bolivia, Chile, Guatemala, Haiti, Paraguay, Peru, and Uruguay.

ticularly in Latin America. The latter restriction is often in response to a country's history of domestic repression.²³⁷

These restrictions on security assistance embody institutionalized policy judgments on human rights and other factors that similarly influence our decision on whether to support particular insurgent groups. Some of the same policy factors that cause the United States to withhold support from certain regimes may also cause the United States to provide, in other situations, military assistance to certain insurgent groups. Pressure for U.S. assistance to the Renamo guerrillas in Mozambique illustrates how a government's identification as Marxist can become the policy basis for insurgent support. These legislative restrictions on security assistance also indirectly benefit insurgent groups where a government might otherwise have been eligible for U.S. weapons and training. The government that has lost that source of assistance has also lost the potential to apply greater force against its insurgents.

Suspension of aid to a supported government, however, as Matheson observes, would be a very difficult practical problem, because it would never be viewed by that government as a neutral political act. This would be true even if the suspension were for human rights violations. He adds that the same factors that initially produced the support would still be at work as an inducement to stretch the facts or legal rationale for continuing the assistance.²³⁸ This simply recognizes the probability that external support to a government fighting insurgents will likely continue during a full-scale insurgency, leaving the insurgents with only a plea for counterintervention or humanitarian relief from repression.

The United States should be doubly cautious, under international and domestic law, about providing counter-insurgency support to a government that may have committed serious human rights abuses. The United States has proven in El Salvador the enormous pressure that exists for continuing support to a friendly government. This is especially so when support seems justified by regional instability believed to be caused by other third state involvement and when human rights progress in the friendly state is being certified by the executive branch. Were the facts otherwise, the United States might be obliged,

**Many of the restrictions on aid to these countries arose in response to the American public concern over repression within those countries. For a review of conditions under the closed political systems of individual Central American countries and the impact of U.S. assistance, see the Kissinger Commission Report, *supra* note 170, at 27-39.

²³⁸See Matheson, *supra* note 208, at 207-08.

under both international and domestic law, to withdraw security assistance. Suspension would be required even if the suspension would give the appearance of supporting the insurgent group.

c. Oversight of Intelligence Gathering and Covert Activities

It has been observed that international law provides no basis for distinguishing between overt and covert use of force, which are both subject to the same rules.²³⁹ There is a significant difference as a practical matter, and states frequently prefer covert action as the best means of protecting national interests.²⁴⁰ For the United States, the difference is not only significant, but divisive. The underlying issue is the appropriateness of covert activity being conducted by democratic governments.²⁴¹ The serious dimensions of the issue have been painfully evident in the national debate on the secret sale of arms to Iran and the diversion of the proceeds to the Contra rebels.

Covert action, primarily through the Central Intelligence Agency, became a key part of the Reagan Doctrine's challenge to Marxist-Leninist states around the world.²⁴² In his analysis of factors over the last decade that have made it more likely that major covert operations will become public, Gregory Treverton²⁴³ has observed that more openness in U.S. policy actions "would reflect the reality that, as the century ends, national boundaries are more and more permeable."²⁴⁴

²³⁹Matheson, *The Role of the Reagan Administration*, 9 *GMU L. Rev.* 21, 22 (1986).
²⁴⁰*Id.*

²⁴¹A symposium held at Tufts University in March 1988 was conducted to study the specific subject of covert activities as they relate to law and government.

For a thorough analysis of covert activities in relation to democratic government, see generally G. Treverton, *Covert Action: The Limits of Intervention in the Postwar World* (1987). On the historical role of the military departments and the Central Intelligence Agency in covert actions, see generally J. Prados, *President's Secret Wars: CIA and Pentagon Covert Operations Since World War II* (1986). See also S. Emerson, *Secret Warriors: Inside Covert Military Operations of the Reagan Era* (1988).

²⁴²Treverton, *Covert Action and Open Society*, 65 *Foreign Aff.* 995 (1987). The practice of covert action, of course, goes back much further, including a National Security Council plan in 1948 originated by George Kennan that is considered the turning point for covert actions as used by the United States today. NSC 1012, known as the "X" article, outlined a plan of containment that authorized a broad range of covert activity. Among the numerous authorized actions were support to resistance movements, guerrillas, refugee liberation groups, and support of indigenous anti-communists. *Id.* at 996.

²⁴³Faculty member of the John F. Kennedy School of Government and former member on the First Senate Select Committee on Intelligence (the Church Committee) from 1975-76.

²⁴⁴*Id.* at 1004, 1009. Treverton suggests that policy makers, in deciding whether to use covert action in pursuit of a particular policy objective, should consider three broad questions. First, can the operation bear the possibility of disclosure? One important signal is whether the covert policy contradicts U.S. open policy, as with the sale of arms to Iran. Second, are the risks involved in disclosure worth the limited objectives attain-

A major policy concern is whether the United States, in assuming responsibility for the groups it supports in covert actions, is associating itself with the enhancement of democracy and the larger cause of human rights. If so, this provides an important safeguard against reactions to the covert activity when the covert action becomes generally known.

Congressional oversight is an important constraint on U.S. covert action. Legislative restrictions on intelligence gathering and covert actions come in different forms affecting support to insurgents in a variety of ways. The oversight process has given Congress, through its respective intelligence committees, much more knowledge of and control over the operations and expenditures of all U.S. intelligence agencies than ever before.²⁴⁵

In the same year that the War Powers Resolution was passed, Congress further affirmed its intent to be actively involved in foreign commitments by passage of the Case Act.²⁴⁶ The Case Act requires prior State Department approval of any international agreement and subsequent transmission of the text of the agreement to Congress within sixty days.

Congressional efforts to further tighten reporting requirements in the oversight of intelligence gathering and covert action continue with renewed vigor, in part a direct consequence of U.S. support of insurgents in Nicaragua.²⁴⁷ A major focus of the Congressional hear-

able due to the necessity of conducting a small operation? Third, what message and to whom do we intend to communicate through the covert action, considering our inability to ultimately control the acts of those receiving aid? *Id.* at 1009-11.

²⁴⁵Gates, *The CIA and Foreign Policy*, 66 Foreign Aff. 215,225 (1987). Robert Gates, from his vantage point as Deputy CIA Director, observed that, as a result of congressional oversight, the CIA finds itself "involuntarily poised nearly equidistant between the executive and legislative branches." *Id.* But see generally Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035 (1986). Professor Lobel argues that Congress needs to exercise more of the powers reserved to it under the Constitution by acting more aggressively than it has been. He states that Congress must control more effectively covert activity authorized by the executive branch, which is carried out by intelligence agencies in a way that threatens to draw the United States into undeclared wars.

²⁴⁶Case-Zablocki Act of 1972, 1 U.S.C. § 112b (1982) [hereinafter Case Act]. The Department of Defense implementation of the Case Act is found in Dep't of Defense Directive No. 5530.3, International Agreements (June 11, 1987).

²⁴⁷The primary legislation governing congressional oversight of covert operations is the Hughes-Ryan Amendment of 1974, as amended by the Intelligence Oversight Act of 1980. Hearings held by the House Committee on Intelligence began in April 1987 to consider requiring prior notice of covert actions to Congress. See generally, *H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives*, 100th Cong., 1st Sess. (1987).

ings on the Contra support was the apparent violation of the funding limitations contained in the Boland Amendment.²⁴⁸ The Boland Amendment provided funds to the CIA, but prohibited their use for military equipment, training, advice, or other military support to any paramilitary group whose purpose was to overthrow the Nicaraguan government or to initiate a military confrontation between Nicaragua and Honduras. Funding limitations have been used by Congress in the past to restrict support of other insurgencies. One of these was the Clark Amendment, which prohibited support to insurgents in Angola.²⁴⁹ Congress initiated the repeal of the Clark Amendment in 1985. This repeal was followed by requests for aid to the resistance movement.²⁵⁰

d. Special and Emergency Executive Authority

An immediate source of assistance available in special emergency situations may be employed at the personal direction of the President. Specific provisions to this effect exist in both the FAA²⁵¹ and the AECA.²⁵² These are very limited exceptions to the normal budgetary process, with certain reporting requirements to Congress. Within the narrow confines of action permitted, which include dollar amount

Hearings were held in November 1987 by the Senate Intelligence Committee on three similar bills correcting perceived deficiencies in the oversight of intelligence and covert action. The legislation included a provision that would have required all covert operations be reported to Congress within 48 hours. *See* Christian Sci. Monitor, Nov. 13, 1987, at 1, col. 3. The Senate passed its version of the 48-hour notice provision (S 1721) on March 15, 1988, by a margin sufficient to override a threatened veto. Wash. Post, Mar. 16, 1988, at A1, col. 1.

The Reagan Administration had vigorously opposed the legislation, citing the need to withhold disclosure where lives were at risk. It was also pointed out that the initiation of regular covert operations, such as the CIA support of Nicaraguan and Afghan rebels, normally have been reported to the congressional committees. *See* Wash. Post, Dec. 17, 1987, at A8, col. 1. The Administration had unsuccessfully sought to head off the issue last year by signing an order requiring every ten days a review of any decision to delay reporting of a covert operation to Congress. But in addition to the Senate bill, a companion bill was introduced in the House of Representatives (HR 38221 that was reported out of committee in June 1988. The legislation was still pending action on the floor at the end of September, facing what was expected to be substantial opposition before the covert action notice requirement actually becomes law.

²⁴⁸*See* Further Continuing Appropriations Act for 1983 § 793, 96 Stat. 1830, 1865 (1982) [hereinafter Boland Amendment].

²⁴⁹*See* International Security Assistance and Development Cooperation Act of 1980 § 118, Pub. L. 96-533, 94 Stat. 3131 [hereinafter Clark Amendment].

²⁵⁰*See generally* Smith, *Trap in Angola*, 62 Foreign Pol'y 61 (1986) (arguing that U.S. covert aid to the Angolan resistance actually caused the reverse of the intended effect by instigating greater Soviet and Cuban military support for the Angolan government).

²⁵¹*See* 22 U.S.C. §§ 2318, 2364, and 2348A (1982).

²⁵²*See* 22 U.S.C. § 2776(b) (1982).

limitations, defense equipment and services can be made available abroad.

Another type of executive authority which the President has exercised to provide indirect support to insurgents is the expanded use of combined training and emergency deployment readiness exercises.²⁵³ The most obvious intent of this form of support is not to inject American personnel, arms, or equipment into hostilities, but rather to provide a timely show of strength and support for the defense of a friendly government, particularly in emergency situations. If that friendly government has been sympathetic to insurgents in a neighboring state, then the U.S. deployment exercise would at least indirectly benefit the insurgents.²⁵⁴

2. *Humanitarian Assistance and Civic Action Legislation*

Humanitarian assistance legislation by Congress is a very wide-ranging area that addresses many of the basic human needs that increasingly are being recognized as a responsibility of the international community. The legislation is a domestic reflection of one important aspect of the growth of the body of international law on human rights.²⁵⁵

Humanitarian assistance and civic activities cover a variety of projects that are flexible enough to be programmed into the mission of nearly any type of military exercise. These too, however, are strictly controlled activities under current statutes and the Comptroller General decisions on training and military construction performed during combined exercises.²⁵⁶ In the past, such assistance was provided under agreements between the Department of Defense and the Agency for International Development under the Economy Act.²⁵⁷

²⁵³See, e.g., *U.S. Troops Ordered to Honduras in Response to Nicaraguan "Invasion,"* Wash. Post, Mar. 17, 1988, at A1, col. 4 (quoting senior administration officials who described the order as part of an "emergency deployment readiness exercise" in which troops would not be used in combat).

²⁵⁴The deployment of U.S. troops to Honduras was ordered by the President "as part of a broad understanding with Honduran leaders to take swift military action against Sandinista forces engaged in battle with Nicaraguan rebels along the Honduran border." Wash. Post, Mar. 18, 1988, at A1, col. 2 (citing an unnamed administration source).

²⁵⁵See *supra* text accompanying notes 8-30. For a study of the specific role of Congress in the advancement of human rights law, see generally D. Forsythe, *Human Rights and U.S. Foreign Policy: Congress Reconsidered* (1988).

²⁵⁶See Comp. Gen. Dec. B-213137 (22 June 1984); Comp. Gen. Dec. B-213137 (30 Jan. 1986).

²⁵⁷31 U.S.C. § 1535 (1982 & Supp. III 1985). The Economy Act permits transfers of goods or services between Federal agencies on a reimbursable basis.

Recently enacted legislation has increased Department of Defense authority to engage in more activities involving humanitarian assistance and civic action. The Stevens Amendment to the Department of Defense Appropriations Act of 1985²⁵⁸ provided the first statutory authority to use Defense Department funds for humanitarian assistance and civic action. Current statutory limits on humanitarian and civic assistance permit activities that are authorized in conjunction with military operations where funds are specifically appropriated for specific humanitarian purposes. An exception is provided for unplanned but incidental and commonplace humanitarian assistance involving minimal expenditures. Annual notice to Congress and regular coordination with other agencies are also required by these same legislative provisions.

The expanded use of Defense Department resources in what has been the province of other agencies demonstrates the perceived link between the social and economic sources of instability and the origins of insurgency.²⁵⁹ This expanded authority on humanitarian assistance does not abrogate the Department of State's principal responsibility for the administration of foreign aid programs consistent with the overall objectives of U.S. foreign policy.

Congress has also played a direct role in this area by actively participating with the use of humanitarian assistance legislation as an instrument affecting support of insurgents. One of the most difficult and protracted legislative battles between the executive and legislative branches has been the recent struggle over humanitarian assistance and so-called "nonlethal aid" to the Nicaraguan resistance forces. The House of Representatives succeeded in passing legislation that mandated a cut-off of funds for military support to the Contras, effective at the end of February 1988.²⁶⁰ The Reagan Administration

²⁵⁸Pub. L. No. 98-473, §§ 101(h), 8103; 98 Stat. 1837, 1942 (1984).

The Department of Defense Authorization Act of 1986 provided permanent authority for humanitarian and civic assistance in conjunction with military operations by adding a separate chapter to Title 10.

This act also provided the Department of Defense with limited authority to transfer to the Department of State nonlethal excess supplies for humanitarian relief purposes. Nonlethal excess supplies includes property, other than realty, "that is not a weapon, ammunition, or other equipment or material that is designed to inflict serious bodily harm or death." *See* 10 U.S.C. § 2547 (Supp. IV 1986).

²⁵⁹This connection between the social and economic conditions in Central America and insurgency was a major theme of the Kissinger Commission Report's recommendations on U.S. military and economic assistance in the region. *See supra* note 170.

²⁶⁰Wash. Post, Feb. 4, 1988, at A1, col. 5. The request was for \$36.2 million in additional money. More than \$200 million in direct aid already has been provided. Of the new amount requested, \$32.6 million was designated for items other than weapons and ammunition. Included in the amount for items other than arms aid, \$7.2 million was

prepared and pressed for passage of a specific package of humanitarian assistance funding as an alternative. That aid package was procedurally blocked due to opposition to the proposed funding, which would have provided nonlethal materiel and equipment that could be used for combat purposes.²⁶¹ Part of the success of the Democratic Party in opposing that humanitarian assistance was attributed to a promise by its leaders that they would pass a substitute humanitarian assistance package for the Contras. The substitute package of humanitarian assistance, consisting only of funds for food, clothing, shelter, and medical care eventually was offered, but it too was defeated.²⁶² Even the manner in which these requests for nonlethal aid were defeated did not reflect reluctance by a majority in Congress to providing humanitarian aid to an insurgent group as a matter of general policy. The debates instead revolved mostly around the composition of the aid and how it was to be delivered.²⁶³

This was borne out later when a negotiated truce was concluded on March 24, 1988, between the Nicaraguan Government and the resistance leaders. Negotiators for both sides agreed that aid decisions by Congress had achieved the intended effect of pushing the two sides to the limited agreement that was reached.²⁶⁴ The agreement included terms explicitly permitting Contra acceptance of humanitarian aid. It was assumed that this aid would consist mainly of food, uniforms, and medicines, to be provided through a neutral third party. In the United States, leaders of both parties promised to provide renewed humanitarian aid for the rebel forces pending negotiation of a final settlement.²⁶⁵

intended as humanitarian assistance, including food, medicine, shelter, and clothing. The balance of the \$32.6 million was intended for what was referred to as "nonlethal aid," which included items that could be used for combat such as vehicles, helicopters, and maintenance parts. *See id.*

²⁶¹Wash. Post, Mar. 4, 1988, at A1, col. 6.

²⁶²*Id.* In an ironic twist, Democratic liberals and Republican conservatives combined their efforts to defeat the proposal. The Democrats had consistently opposed any kind of assistance to the Contras. The Republicans, however, apparently voted against the diluted aid package fearing that passage of the bill would provide an easy excuse for the other members of Congress not to vote in favor of additional military assistance for the Contras.

²⁶³*See* Wash. Post, Mar. 25, 1988, at A29, col. 5. Congress subsequently passed a \$47.9 million humanitarian aid package for the Contras, which President Reagan signed on April 1, 1988. Wash. Post, Apr. 2, 1988, at A16, col. 1.

²⁶⁴*Id.* at A1, col. 2.

²⁶⁵*Id.* at A29, col. 5. Following a collapse of negotiations between the Sandinista and the resistance leaders, a bipartisan congressional effort was made to provide humanitarian aid to the Contras, with the possibility of military aid to follow later in the year. The plan would have provided \$27.14 million in new nonlethal aid and conditional release of up to \$16.5 million worth of military supplies being stored in Honduran warehouses. President Reagan declined to fully support the plan because of the means

Similar issues revolving around continued U.S. lethal and non-lethal aid to the Afghan resistance temporarily stalled progress on the Soviet's negotiated withdrawal.²⁶⁶ American military and humanitarian assistance to the *mujaheddin* during the past year was reported to be more than \$600 million.²⁶⁷ The Soviet Union strongly voiced its opposition to a U.S. demand for a "symmetrical" cut in aid to the Afghan government and the guerrillas. The Soviets raised the argument that their assistance from one recognized government to another should not be equated to U.S. clandestine aid to insurgents. The withdrawal agreement as implemented, however, reflected Soviet acceptance of reciprocal restraint in providing aid.²⁶⁸

U.S. legislation providing humanitarian aid to insurgents has also included relief for the victims of war.²⁶⁹ This responds to a related, yet distinct, need for continuing U.S. humanitarian relief for the victims of these conflicts.²⁷⁰ The established international right to provide and to receive neutral humanitarian aid should not be obscured by the issue of humanitarian assistance designed to support insurgents. These examples of humanitarian assistance to insurgents, however, are significant because they reflect the extent to which third state humanitarian assistance and nonlethal aid to insurgent groups has come to be viewed as an acceptable practice, at least from the perspective of U.S. policy makers. These developments particularly demonstrate that Congress gradually has become a willing partner

of delivery specified, its attachment to the annual defense appropriations bill, and the absence of guarantees on military aid. Republican leaders withdrew their support for the plan, but the measure, nonetheless, was passed by the Senate on August 10, 1988, in a vote that divided along party lines. Felton, *ContraAid: Democratic Muscle, Partisan Fallout*, 46 Cong. Q. Weekly Rep. 2285-87 (1988).

²⁶⁶*Id.* at A1, col. 6.

²⁶⁷Wash. Post, Mar. 17, 1988, at A36, col. 1.

²⁶⁸*Id.* Three bilateral agreements were signed by Afghanistan and Pakistan on April 14, 1988, in Geneva, to end the conflict in that region. The United States and the Soviet Union signed an additional declaration as "states-guarantors." These instruments are collectively referred to as the Geneva accords. A separate "U.S. Statement" was issued in Geneva that embodies the symmetry concept, enabling the United States to offset Soviet military aid to the Kabul regime with U.S. aid to the Afghan resistance. Klass, *Afghanistan: The Accords*, 66 Foreign Aff. 922-25, 933-36 (1988). The Department of State's legal analysis and a letter on the matter from Soviet Foreign Minister Edouard Shevardnadze to Secretary of State George Shultz are among the documents that remain classified. *Id.* at 925, 942-43.

²⁶⁹Earlier this year, a humanitarian assistance package for the Nicaraguan resistance also specifically provided \$17.7 million for medical treatment of children of both sides who have been wounded in the conflict. Wash. Post, Apr. 1, 1988, at A4, col. 1.

²⁷⁰U.S. efforts to help resettle the estimated five million Afghan refugees is being planned, according to Secretary of State Shultz, but may be impaired by current budget cutbacks. Wash. Post, May 7, 1988, at A17, col. 1. Afghan refugees in Pakistan constitute the single largest group of refugees in the world. Karp, *War in Afghanistan*, 64 Foreign Aff. 1026, 1044 (1986). See also *supra* note 255 and accompanying text.

with the President in providing humanitarian support directly to insurgents.

IV. FORMULATING A POLICY APPROACH TO U.S. SUPPORT OF INSURGENTS

A. SOURCES OF U.S. NATIONAL INTERESTS AND DOMESTIC CRITERIA FOR INSURGENCY INTERVENTION

A number of noted policy makers have made major contributions to the issue of when U.S. foreign policy should include the use of force and what domestic standards should apply. That dialogue is especially important now. The national debate in some ways has tended to focus more on the broad, universally applicable principles of aggression and intervention, rather than on the policy concerns tied to concrete national interest.²⁷¹ A proper balance, however, must be struck between the formulation of general criteria for intervention and the specific national interests to be served by intervention.

1. U.S. National Interests as Policy Objectives

The central thread of the Reagan Administration's policy on the use of military force, according to former Secretary of Defense Caspar Weinberger, has been one which sought to combine sufficient military strength with a clear determination to employ it against any attack on our vital interests so that we might eliminate the benefits of, and ultimately deter, aggression.²⁷² A credible deterrent policy must take into account the finite nature of U.S. resources in both human and material terms. The United States must therefore realign its defense commitments to match the limits of American capabilities.²⁷³ On the use of American military force, Weinberger recommended the following specific domestic criteria:

1) that the vital interests of the United States or its allies be at stake;

²⁷¹Tonelson, *The Real National Interest*, 61 Foreign Aff. 49 (1985-86).

²⁷²Weinberger, *U.S. Defense Strategy*, 64 Foreign Aff. 675-77, 689-90 (1986).

²⁷³*Id.* at 678. The reasons behind the need to acknowledge the limits of U.S. power were the focus of an article co-authored by Henry Kissinger and Cyrus Vance. They concurred that "(d)espite our vast military power, our ability to shape the world unilaterally is increasingly limited. Even with strong domestic support, we can no longer afford financially to do as much internationally by ourselves as was the case in the immediate postwar period." Kissinger and Vance, *Bipartisan Objectives for American Foreign Policy*, 66 Foreign Aff. 899, 900 (1988).

- 2) that we be able to commit sufficient numbers with adequate support to win;
- 3) that we clearly define the military and the political objectives;
- 4) that we continually reassess and adjust objectives and forces as necessary;
- 5) that we have "some reasonable assurance" of the support of the American public; and
- 6) that we first exhaust the available diplomatic, political, and economic alternatives.²⁷⁴

"The caution sounded by these six tests for the use of military force is intentional," Weinberger added. "The world consists of an endless succession of hot spots in which some U.S. forces could play, or could at least be imagined to play a useful role."²⁷⁵

Secretary of State Shultz also has observed that, although the use of military force will remain an indispensable aspect of responding to the conflicts that persist in the world, the United States "should not engage in a military conflict without a clear and precise mission, solid public backing, and enough resources to finish the job."²⁷⁶ Shultz added, however, that certain situations also would arise that call for a discrete or limited use of force that falls short of a full national commitment.²⁷⁷

Others have voiced the same note of caution sounded by Weinberger on the need to balance national interests and the deterrence of global aggression. One scholar on American policy making has described the goal this way:

Although we should try to prevent increases in Soviet power by supporting those who resist it, it would be counterproductive to pursue even this general interest at all costs, anywhere, anytime. To do so would weaken our ability to actually intervene where and when it matters most. Our interests cannot all be of equal importance. We must have priorities and defend our interests selectively.²⁷⁸

²⁷⁴*Id.* at 685-87. See also Address by Caspar W. Weinberger, National Press Club (Nov. 28, 1984), reprinted in *The Uses of Military Power*, Defense, Jan. 1985, at 2.

²⁷⁵*Id.* at 689.

²⁷⁶Address by Secretary of State George Shultz, 1984 Conference of the Trilateral Commission, quoted in Tonelson, *supra* note 271, at 61-62.

²⁷⁷*Id.* at 62. See also Shultz, *New Realities and New Ways of Thinking*, 63 Foreign Aff. 705 (1985).

²⁷⁸Van den Haag, *The Busyness of American Foreign Policy*, 64 Foreign Aff. 113, 117 (1985).

Other commentators similarly have asserted that the failure to establish realistic foreign policy priorities carries serious potential consequences that have led inexorably to the nation's current problems of strategic overextension and economic deficits.²⁷⁹

2. *Domestic Criteria for Insurgency Intervention*

A well-known set of domestic criteria for the use of force specifically in insurgencies has been proposed by Representative Stephen J. Solarz. Solarz affirms the need to "stay within accepted international norms whenever possible."²⁸⁰ He also sees a need for selective intervention and a growing general recognition that the United States has significant values to protect in certain internal and regional conflicts abroad. Complete American passivity in the face of Soviet violations of those accepted norms, he says, would be "neither politically practical nor strategically prudent."²⁸¹

Solarz would agree that the first question is whether the proposed aid serves our own national interests.²⁸² He emphasizes that, although anticommunism and the pursuit of democracy and human rights are still distinct and important foreign policy objectives, the final decision should be based on the direct national interests of the United States and not solely on ideological imperatives.²⁸³

That statement echoes the opinion of former Secretary of State Vance, who emphasized that the pursuit of fundamental freedoms and human rights in U.S. foreign policy is still compatible with the pursuit of U.S. national interests.²⁸⁴ "In a profound sense," wrote Vance, "America's ideals and interests coincide, for the United States has a stake in the stability that comes when people can express their hopes and build their futures freely."²⁸⁵

With national interests as the policy goal, Solarz offers six key questions to be addressed when determining whether assistance to a particular insurgency actually is in the national interest of the United States:

1) What are America's central policy objectives in the area in question?

2) What is the best way to achieve U.S. objectives?

²⁷⁹See, e.g., Layne, *supra* note 189, at 80.

²⁸⁰Solarz, *When to Intervene*, 63 Foreign Pol'y 20-21 (1986).

²⁸¹*Id.* at 21.

²⁸²See *id.* at 22.

²⁸³*Id.* at 37, 39.

²⁸⁴See *supra* note 211 and accompanying text.

²⁸⁵Vance, *supra* note 196, at 8.

3) How do America's friends in the region view U.S. support for the insurgency?

4) How closely tied to the Soviet Union is the regime that the insurgency is challenging?

5) How likely are the insurgents to achieve their goals with and without American aid?

6) Would achievement of the resistance's objectives significantly improve life in the country and advance U.S. interests?²⁸⁶

Applying his test, Representative Solarz mentioned only Afghanistan, Cambodia, Angola, and Nicaragua as worthy of consideration for U.S. support.²⁸⁷ Although Solarz underscored the preeminence of national interests in his standards, these six criteria have been criticized for having the effect of raising other factors to the same level of importance as the most vital American interests. By requiring that all six of the elements be satisfied, factors that are not matters of American vital interest have been presumed by some commentators to be just as significant under the Solarz criteria as those that are vital interests.²⁸⁸ According to that criticism, the United States realistically has very few tangible interests that compel extensive political, much less military involvement, in the Third World where most insurgencies occur.²⁸⁹ Even if accurate, this criticism of the Solarz test would have significance only if the sum of the criteria regarding a particular insurgency would result in intervention mainly for ideological reasons.

Various legal authorities have also reinforced and elaborated on

²⁸⁶*Id.* at 25. Cf. Armitage, *Tackling the Thorny Questions on Anti-Communist Insurgencies*, Defense, Oct. 1985, at 15. Deputy Assistant Secretary of Defense Richard L. Armitage named the following similar considerations, which he called "working guidelines," to determine the nature and extent of U.S. support to insurgents:

- 1) whether the insurgents are worthy of support, in that their success would be preferable to the regime in power;
- 2) whether the aid should be overt or covert;
- 3) whether the aid is suitable to meet the insurgents' needs, in terms of being timely, adequate, and reasonably expected to continue;
- 4) whether the aid will enhance broad U.S. security interests, including the impact on East-West relations; and,
- 5) whether the aid can be provided in concert with friends and allies.

Id. at 17-20.

²⁸⁷*Id.* at 26-36.

²⁸⁸"See Tonelson, *supra* note 271, at 72.

²⁸⁹Layne, *supra* note 189, at 87. See also Tonelson, *supra* note 271, at 70-72. Tonelson stated that, in regions of secondary interest, Americans have much greater policy latitude to identify those conflicts that are appropriate for what he referred to as "benign neglect." *Id.* at 64.

the U.S. national interests and the standards to be applied for intervention in insurgencies. Among those commentators is Lloyd Cutler,²⁹⁰ who has offered the following specific criteria:

1) whether the threat to U.S. vital interests is serious enough to sustain public consensus on a policy that may put American lives at risk;

2) whether sufficient financial and logistical resources are available to deliver enough support to have a real effect on the conflict's outcome;

3) whether American armed forces are likely to become drawn into a protracted, direct combat role;

4) whether the use of covert assistance would be an implicit admission of illegality when ultimately discovered;

5) whether the action is "likely to provoke a shooting confrontation" between the superpowers; and

6) whether the side we support in the conflict differs significantly in its respect for the human right of democracy.²⁹¹

All of these various articulations of U.S. national interests involved in the decision of whether to use force and the domestic criteria in insurgency intervention complement each other well. They provide a reasonably complete picture of what national interests are to be evaluated as part of the policy-making process. Any US. foreign policy issue would be better served by the application of these standards regardless of the circumstances surrounding the support of freedom fighters. The need remains, however, to assemble these domestic criteria on support of insurgents into a more systematic policy process that also takes into account the constraints of international law.

B. A POLICY-ANALYSIS MODEL FOR U.S. SUPPORT OF INSURGENTS

To avoid drifting into the trap of crisis-oriented policy making, the ongoing national dialogue on policy objectives and criteria for intervention in support of insurgents must always be viewed in the broader scope of international law as well as global political realities. The separate elements represented in the policy-analysis model to be

²⁹⁰Member of the National Group of the United States in the Permanent Court of Arbitration in The Hague.

²⁹¹See Cutler, *The Right to Intervene*, 64 Foreign Aff. 96, 109-11 (1985).

proposed here are intended to achieve three major purposes in the area of support for insurgents. The first is to obtain as much of a domestic consensus as possible on U.S. policy objectives, which should be based on essential national interests that are defined at the outset. A second purpose is to emphasize the need to recognize insurgencies, national liberation movements, and internal conflict in pursuit of self-determination and fundamental rights, as independent sources of geopolitical instability and regional conflict, distinct from interstate forms of aggression. The final purpose is to clearly place the discernible principles of international law among the factors to be considered in the decision-making process.²⁹²

These domestic, geopolitical, and legal aspects affecting U.S. policy can be assembled into the following systematic approach that suggests specific progressive steps to be taken in the policy process.

1. National Policy Decision on Objectives

A national policy decision on the objectives and interests to be served in the support of an insurgent group should be made at the outset. It should be made by weighing our direct, tangible national interests. It should also include the less direct, ideological identification we have with democratic self-determination in opposition to repressive totalitarian regimes.

2. Application of Domestic Criteria for Insurgency Intervention

The domestic criteria for insurgency intervention would be applied next. This involves an analysis of alternative means offering a substitute to the use of force. The domestic criteria for insurgency intervention would be applied as a way of determining whether the proposed action would actually serve the intended U.S. policy objectives.

3. Compliance with U.S. Domestic Law

A decision to support an insurgent group that has passed the tests of national interests and domestic criteria for intervention must be capable of being implemented through operations that conform to

²⁹²See generally, Oliver, *International Law, Morality, and the National Interest*, 1 Am. U.J. Int'l L. & Pol'y 57 (1986). Professor Oliver criticized the "minimalist place" assigned to international law by diplomats, particularly George F. Kennan. Oliver said Kennan's writings address only the role that national interests and morality play in international relations. But Oliver also recognized that a "gulf exists between international legal scholars in their closets on the one hand and real world needs and challenges to legal order on the other." He in part attributed this "decline of international law as a factor of weight in foreign relations" to what he referred to as widespread "systemic complacency." *Id.* at 59. Cf. Kennan, *Morality and Foreign Policy*, 64 Foreign Aff. 205 (1985-86).

domestic law. This must be a conscious factor applied in the initial executive decision on whether and how to support a particular insurgent group.

4. Conformity to a Cognizable International Legal Standard on Intervention

The search for a principled and cognizable rule of international law applicable to support of insurgents is an ongoing process in itself. But as Professor Reisman notes, “in the meanwhile, rational and responsible decisions will have to be made in the many cases that continue to present themselves.”²⁹³ Reisman concludes that in making these decisions, policy makers will have to keep clearly in view the basic and enduring community objectives that the use of coercion must serve: contemporary world order and fundamental human dignity.²⁹⁴

What then happens when vital national interests and the domestic criteria on intervention strongly endorse insurgency support regardless of the traditional principles of international law? As a general matter, international law accommodates the exigencies of national security by its emphasis on protecting the territorial integrity and political independence of states. The right of self-defense is the main example, even aside from an expanded concept of self-defense in response to covert attack.

International law, however, is still seeking an equilibrium between protection of state sovereignty and respect for fundamental rights. Additional demands, more or less noble, may intensify the domestic pressure for intervention on behalf of presumed freedom fighters. When national interests and the domestic intervention criteria carry policy measures beyond the traditional, albeit not-so-bright lines of international law, crucial warning signals should flash for a variety of practical policy reasons. Any step farther down the same path toward intervention should be well-considered and firmly grounded in an articulable and defensible standard of law.

National policy makers would enhance, therefore, domestic and international support for policy actions in any insurgency to the extent their decisions adhere to those particular post-Charter international norms that are clearly established. Where the perceived political realities make conformity to traditional principles of international law impossible, other discernible and principled guidelines on the use

²⁹³Reisman, *supra* note 97, at 285.
²⁹⁴*Id.*

of force are continuously evolving to control intervention, especially in the areas of counterintervention and humanitarian intervention. For the reasons already discussed, humanitarian intervention and counterintervention against external aggression will become increasingly significant as these two emerging principles continue to develop their own objectively reviewable criteria.

5. Oversight and Continuing Evaluation of Changing Conditions

Although the participation of congressional leaders would be desirable early in the process, the initial operational decisions on the support of an insurgent group normally will have been made by the executive branch. It then becomes incumbent on congressional leaders to be prepared to serve actively as a check and balance by employing the same standards that should have been applied in the initial decision to provide insurgent support. The effective legislative tools are already in place to control funding for assistance, deployments, and intelligence gathering. The rapidly changing circumstances of the insurgency will require an ongoing process of monitoring events followed by congressional action.

6. International Supervision and Continued Humanitarian Assistance

After a disengagement of forces, some form of international supervision of a peace accord and new elections, as well as supervision of humanitarian assistance needed for the postwar recovery, will be vital for the future prospects of democracy and nation building. Whatever justification was used initially by the states that intervened during the conflict probably could not be maintained as a basis for continuing unilateral intervention.

The circumstances of U.S. support for the Afghan resistance illustrate a policy that appears to have successfully accomplished, so far, each of these progressive steps in the policy-analysis model. U.S. support of the Nicaraguan resistance, on the other hand, probably demonstrates the case of how a policy in favor of supporting a particular insurgent group has not fared well in the decision-making process.

The Reagan Administration appears to have made a fairly clear decision about the national security objectives it wanted to pursue through intervention in support of the Nicaraguan resistance. At the next stage, the policy of supporting the Contras generally met most of the domestic criteria for intervention, including U.S. popular support for democratic self-determination in Nicaragua; but the policy fell

victim to vacillation in the consensus on support.²⁹⁵ Once the covert operations became public knowledge, there were warning signals that the uncertain public and congressional support was being affected by doubts as to other domestic criteria. These included, for example, questions about the popular Nicaraguan backing and democratic convictions of the Contras, exacerbated by claims of their own human rights violations.

The real quagmire began at the next stage. The policy fell into the entanglement of alleged violations of domestic law in funding the operations. At yet another level, there was at least apparent disdain for international law by ignoring the ICJ as a potential forum for articulating the principled basis relied on by the United States for its intervention. These successive obstacles to a fully successful policy program were aggressively attempted or bypassed. The implementation of U.S. policy reached a point that some achievement resulted, in terms of limited concessions by the Sandinista Government. The farther down this policy road we went, however, the greater were the political and material costs for the United States, both at home and abroad.

V. CONCLUSION

A substantial degree of commonality exists among U.S. national interests, the purposes of post-Charter international law, and the realities of global political relations. This recognition primarily relates to the benefits to be achieved and shared through a stable and just world system. Yet, significant conflicts exist as well, each of them generated by a different purpose.

One purpose that generates conflict at every level of insurgency analysis is that of self-determination and the enforcement of human rights. Traditional international law continues to be unable to recon-

²⁹⁵The security objectives in Central America that were actively pursued by the Reagan Administration through covert aid appear much less ambiguous and equivocal than the stated objectives of U.S. policy in the region as articulated publicly through the media. This divergence continues to have an effect on our policy in the region, according to Kissinger and Vance.

Central America provides a conspicuous example of an area where U.S. policy has suffered because of a lack of clear-cut national objectives that could be publicly debated and congressionally mandated. Confusion remains over whether our principal aim should have been to overthrow the Nicaraguan government, halt Nicaraguan support for insurrections elsewhere in Central America, eliminate the Soviet-Cuban presence and military assistance in Nicaragua or democratize the Sandinista regime.

Kissinger and Vance, *supra* note 273, at 918.

cile, through an effective set of rules on the use of force, the Charter's coequal principles of protecting state sovereignty and promoting self-determination and fundamental human rights. Similarly, international relations seek an enduring equilibrium of political forces. An objective means to accommodate emerging nationalism and revolutionary change while avoiding superpower confrontations in regional conflicts must be provided. Finally, U.S. policy objectives strive to achieve a delicate balance between limited domestic resources and ever expanding global commitments resulting from the demands of national security, as well as a sense of obligation to spread democratic ideals.

The internal tension seems likely to continue at all levels of analysis—domestic, geopolitical, and legal—as the volatile issue of support to “freedom fighters” continues to impact on all three areas. The increasing world focus on human rights will continue to reflect the tension between the goal of traditional international law protecting state sovereignty versus the broader goals reflected in current international practice and the formulation of U.S. foreign policy. Our national interests call for us to bridge that gap by formulating and implementing a national policy on insurgency support that sets aside crisis management and simplistic geopolitical reactions. United States policy in support of insurgents must invoke the reasoned, humanitarian principles that are consistent with our own revolutionary origins, our respect for law, and our heritage of democratic freedoms.

A CONTRACT LAWYERS GUIDE TO THE REQUIREMENT FOR MEANINGFUL DISCUSSIONS IN NEGOTIATED PROCUREMENTS

by Captain Timothy J. Rollins*

I. INTRODUCTION

Negotiated procurements represent some of the most complex and important of the Army's procurements. As the use of negotiated techniques increases, so too does the number of protests filed against them. In fact, protests against negotiated procurements now constitute the majority of all bid protests filed with the General Accounting Office (GAO).¹ One of the most important components of the negotiated procurement—and one that generates a large number of protests—is the GAO's requirement that contracting officers hold "meaningful discussions" with all offerors in the competitive range.

The Federal Acquisition Regulation requires contracting officers to "conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range." Although this same regulation states that "[t]he context and extent of the discussions is a matter of the contracting officer's judgment," the GAO, through the exercise of its bid protest function, has severely limited the contracting officer's discretion in this area. Specifically, the GAO has stated

*Judge Advocate General's Corps, U.S. Army. Currently assigned to Contract Appeals Division, U.S. Army Legal Services Agency. Previously assigned to Contract Law Division, Office of The Judge Advocate General, 1987-1988; and as a contract lawyer, Office of the Chief Attorney (Acquisition), Headquarters Services, Washington, 1986-87. Graduate, Judge Advocate Officer Basic Course, 1986. B.A. magna cum laude, University of Illinois-Urbana, 1982; J.D. magna cum laude, Harvard Law School, 1985. Author of *Processing GAO Bid Protests*, The Army Lawyer, May 1988, at 7; *Standing—Injury-in-Fact Requirements*, 98 Harv. L. Rev. 236 (1984). Member of the bars of the State of Illinois and the United States Army Court of Military Review. The author would like to express his appreciation to Mr. Richard McGinnis, who first introduced the author to the realm of negotiated procurements and who reviewed the manuscript for this article; to Mr. Herbert Kelley for his support and for the discussions we have had on this topic; and to Colonel Maurice O'Brien, for his interest and support.

¹At a conference on government procurement held by Federal Publications on January 29, 1988, Mr. Seymour Efron, an Associate General Counsel for the General Accounting Office, noted that in calendar year 1987 57% of all protests were filed against negotiated procurements.

²48 C.F.R. § 15.610 (1986).

that the requirement for discussions can only be fulfilled through “meaningful” discussions.³

Unfortunately, the standards that the GAO has developed in this area of procurement law are, at least on their face, difficult to reconcile. Compare, for example, the standard that “agencies must point out weaknesses, excesses or deficiencies in the offeror’s proposal” with the standard that “agencies are not obligated to afford offerors all-encompassing discussions.” Or compare the statement that agencies need only “lead offerors into the areas of their proposals which require amplification” with the statement that “discussions should be as specific as practical considerations will permit.” Or compare the standard that “once discussions are opened, the agency must point out all deficiencies and not merely selected areas” with the host of specific types of deficiencies that the GAO has stated need not be discussed.⁴

Often these sets of potentially contradictory standards are contained within the same GAO decision.⁵ Sometimes a decision will cite only those standards that support the outcome.⁶ In almost all cases it may appear, at least superficially, that the GAO simply makes an *ad hoc* determination whether it wants to sustain or deny the protest and selects as determinative a legal standard that will support the desired result. If this is indeed the case, perhaps contract lawyers can only throw up their hands in despair and forgo any effort to ascertain for themselves whether meaningful discussions have been held in a particular negotiated procurement.

However, we can hope that this is not the case—that there is an articulable philosophy at work that fits the GAO’s decisions in this area into a coherent framework, but which the GAO has had trouble clearly and consistently articulating. By analyzing the GAO’s most recent decisions in this area, it may be possible to construct a standard that is somewhat more helpful for the practicing contract lawyer than those standards that the GAO has enunciated.

This article, then, will examine the law that the GAO has articu-

³See, e.g., Price Waterhouse, Comp. Gen. Dec. B-220049 (16 Jan. 1986), 86-1 CPD ¶ 54 at 6, *affd on reconsideration*, B-220049.2 (7 Apr. 1986), 86-1 CPD 333 (“such discussions must be meaningful”).

⁴See generally text accompanying *infra* notes 27-42.

⁵See, e.g., TM Systems, Inc., Comp. Gen. Dec. B-228220 (10 Dec. 1987), 87-2 CPD ¶ 573 at 3-4.

⁶See, e.g., Target Financial Corporation, Comp. Gen. Dec. B-226683 (29 June 1987), 87-1 CPD ¶ 641 at 4 (noting that “[a]ll that is necessary is that agencies lead offerors into areas of their proposals needing amplification,” without mentioning the requirement that discussions be as specific as practicable).

lated regarding the requirement for meaningful discussions, explore the possibility of articulating an alternate standard that has sufficient predictive power to be of value to contract lawyers, and provide some practical advice for contract lawyers faced with determining whether meaningful discussions were conducted in a particular procurement.

11. THE REQUIREMENT FOR DISCUSSIONS — AS ARTICULATED BY THE GENERAL ACCOUNTING OFFICE

A. WITH WHOM MUST DISCUSSIONS BE HELD?

1. The General Rule

In general, discussions must be held with all offerors in the competitive range. Conversely, there is no requirement for discussions, “meaningful” or otherwise, with offerors properly excluded from the competitive range.⁷ While it is not the purpose of this article to explore the law regarding competitive range determinations, it is worth noting two errors commonly made by contracting officers when forming the competitive range, because an offeror improperly excluded may have a valid argument that the agency failed to conduct meaningful discussions.

Some contracting officers wrongly assume that any proposal that is technically unacceptable may automatically be excluded from the competitive range.⁸ To the contrary, the GAO has made it very clear that, to be properly excluded from the competitive range on the

⁷*See, e.g.*, California Microwave, Inc., Comp. Gen. Dec. **B-229489** (24Feb. 1988), **88-1 CPD ¶ 189**; Imagineering Systems Corporation, Comp. Gen. Dec. **B-228434.2** (4 Feb. 1988), **88-1 CPD ¶ 109** at 3.

⁸There has been some indication in the GAO bid protest agency reports submitted to The Contract Law Division, Office of The Judge Advocate General, that some contracting officers (and contract lawyers) are confusing the concept of “technical unacceptability,” used in negotiated procurements, with the sealed bidding concept of “nonresponsiveness.” The latter doctrine mandates that any bidder who fails to meet a material requirement of the solicitation be excluded from consideration. However, the concept of “nonresponsiveness” is inapplicable to the field of negotiated procurements. *See, e.g.*, Loral Telecom; Marconi Italiana, Comp. Gen. Dec. **B-224908**; Comp. Gen. Dec. **B-224908.2** (18Feb. 1987), **87-1 CPD ¶ 182** at 8 (the concept of responsiveness. . . generally does not apply to the give-and-take of negotiated procurements”). Indeed, the whole reason for negotiation is to cure defects in offerors’ proposals, and proposals that do not meet the requirements of the solicitation even after discussions are properly called “technically unacceptable.” *See id.*

grounds of technical unacceptability, the deficiencies in a proposal must be such that the proposal cannot be made acceptable without major revisions.⁹ Thus, informational deficiencies which could be cured by simply asking for additional information from the offeror, or minor deviations from the requirements of the solicitation that could potentially be corrected when brought to the offeror's attention, cannot legitimately serve as the basis for an exclusion from the competitive range.

The other common error in forming a competitive range involves an area of the law that the GAO just recently clarified. In the 1986 decision of *HCA Government Services, Inc.*,¹⁰ the GAO for the first time clearly stated that a technically acceptable proposal, even one that is only "marginally acceptable," cannot be excluded from the competitive range without first considering cost or price. The GAO has reaffirmed this principle a number of times in the past year. "

Although the GAO's decision to enforce this principle came rather abruptly, the reasoning makes sense. Contracting officers are required by regulation to consider cost or price both in the determination of the competitive range¹² and in the source selection decision.¹³ Thus, although a contracting officer may know intuitively that a marginally acceptable technical proposal has no reasonable chance for award, the analysis cannot be complete until the contracting officer has considered any cost advantages offered by that proposal.¹⁴

As a practical matter, this means that contract lawyers must ensure that, where the contracting officer has eliminated technically acceptable proposals from the competitive range, he or she has documented that cost or price was considered before eliminating those proposals.

⁹See, e.g., *Coopers & Lybrand*, Comp. Gen. Dec. **B-224213** (30 Jan. 1987), 87-1 CPD ¶ 100 at 6, in which the GAO found improper the agency's decision to exclude from the competitive range a proposal that was technically unacceptable but which could have been made acceptable without major revisions to the proposal.

¹⁰Comp. Gen. Dec. **B-224434** (25 Nov. 1986), 86-2 CPD ¶ 611, *affd on reconsideration*, Comp. Gen. Dec. **B-224434.2 et al.** (24 Apr. 1987), 87-1 CPD ¶ 434.

¹¹See, e.g., *Howard Finley Corporation*, Comp. Gen. Dec. **B-226984** (30 June 1987), 87-2 CPD ¶ 4.

¹²Fed. Acquisition Reg., 48 C.F.R. § 15.609(a) (1987) [hereinafter FAR].

¹³FAR, 48 C.F.R. § 15.605(b) (1987).

¹⁴However, contracting officers need not consider cost where a proposal has been excluded from the competitive range because it *is* technically unacceptable and cannot be made acceptable without major revisions. See, e.g., *Data Resources*, Comp. Gen. Dec. **B-228494** (1 Feb. 1988), 88-1 CPD ¶ 94.

2. *The Award on Initial Proposals Exception*

Other than proposals properly excluded from the competitive range, there is only one situation where the contracting officer may properly refuse to hold any discussions with an offeror, regardless of the type or extent of defects contained in its proposal. There is no requirement that the contracting officer engage in meaningful discussions where the contract will be awarded on the basis of initial proposals. A contract may properly be awarded only on the basis of initial proposals, however, where: 1) the solicitation specifically notifies offerors that award may be made on the basis of initial proposals;¹⁵ 2) no discussions are held with any offeror; and 3) an award on initial proposals will result in the lowest overall cost to the government.

a. What Constitutes Discussions?

The issue of what constitutes discussions (versus “clarifications”), while well-settled by the General Accounting Office, is one of those contract law principles that some contracting officers and contract lawyers have yet fully to grasp. Some contracting officers still label their discussion questions as “requests for clarification” in the mistaken belief that, where an agency is merely requesting additional information from an offeror, it is engaging in “clarification” rather than “discussions.”

However, in this area of the law the GAO looks beyond labels to the actual effect of the communications, whatever they are called. Thus, “discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal.”¹⁶ This principle holds true for both technical and cost proposals — thus a simple call for best and final offers constitutes discussions because it provides offerors with an opportunity to revise their cost proposals.¹⁷

¹⁵Most Requests for Proposals [hereinafter RFP] incorporate by reference FAR, 48 C.F.R. § 52.215-16 (1987), titled “Contract Award,” which explicitly notifies offerors that award may be made on the basis of initial proposals.

“Motorola, Inc., Comp. Gen. Dec. **B-225822** (17 June 1987), 87-1 CPD **7604** at 3; *see also* McManus Security Systems, Comp. Gen. Dec. **B-231105** (21 July 1988), 88-2 CPD ¶ **68** at 4; Concord Electric Company, Comp. Gen. Dec. **B-230675** (25 May 1988), 88-1 CPD ¶ **501**; Corporate America Research Associates, Inc., Comp. Gen. Dec. **B-228579** (17 Feb. 1988), 88-1 CPD ¶ **160** (agency properly reopened discussions rather than asking for clarification where it needed information material for evaluation purposes).

¹⁷*See, e.g.*, Metron Corporation, Comp. Gen. Dec. **B-227014** (29 June 1987), 87-1 CPD ¶ **642** (“Generally, we consider that discussions have taken place if an offeror is given the opportunity to revise its initial proposal, either in terms of price or technical approach.”); **B.K. Dynamics, Inc.**, Comp. Gen. Dec. **B-228090** (2 Nov. 1987), 87-2 CPD

Because agencies do not normally communicate with offerors except to obtain information necessary to evaluate the proposals or to provide offerors with an opportunity to modify their proposals, almost every communication between the government and an offeror will constitute discussions, unless that communication does not rise above the level of correcting the most minor clerical errors or ambiguities that are apparent on the face of the offer.” However, even “errors” and “ambiguities” may not be susceptible to correction through “clarification” if their resolution is crucial to the agency’s evaluation of the proposal.¹⁹

For the contract lawyer reviewing a file, the assumption should be that any communication between an offeror and the government constitutes discussions,” and it should be the rare case indeed where the contract lawyer approves an award on initial proposals where communications have been exchanged between the contracting office and the proposed awardee.

¶ 429 at 3, *affd on reconsideration*, Comp. Gen. Dec. B-228090.2 (18 Feb. 1988), 88-1 CPD ¶ 165 (“the Air Force’s request for best and final cost proposals constituted discussions”).

“*See, e.g.*, Dresser Industries, Inc., Comp. Gen. Dec. B-227904 (11 Sept. 1987), 87-2 CPD ¶ 237, in which the agency made an error in evaluating the awardee’s cost proposal. The GAO held that the offeror’s letter, which neither changed nor supplemented its initial proposal but merely explained how the agency had erred in its evaluation, constituted clarifications rather than discussions.

¹⁹*See, e.g.*, Allied Corporation; Menasco, Inc.—Requests for Reconsideration, Comp. Gen. Dec. B-223970.2; Comp. Gen. Dec. B-223970.4 (20 Mar. 1987), 87-1 CPD ¶ 317, in which the GAO held that discussions had been held because a communication with the offeror clarifying an ambiguity in its proposed price was “essential for evaluating [the] offer.” However, compare the *Allied* decision with *Ralph Korte Construction Company, Inc.*, Comp. Gen. Dec. B-225734 (17 June 1987), 87-1 CPD 1603, where the offer contained an obvious arithmetic error in the proposed price in that the sum of certain line items did not match the subtotal for those line items. Other evidence indicated that the offeror had meant to transfer \$70,000 from one of these line items to another line item which had been increased by \$70,000. The GAO held that asking the offeror to confirm which line item was in error constituted a clarification rather than discussions. One might question how the offer in *Korte* could have been evaluated without having the offeror confirm which line item was in error, and it may be important in explaining the *Korte* decision that the GAO also noted that, “in any event,” allowing the correction worked no competitive harm to the protester, which had taken numerous exceptions to the RFP provisions. Similarly, in *Stacor Corporation*, Comp. Gen. Dec. B-231095 (5 July 1988), 88-2 CPD ¶ 9, the GAO held that allowing an offeror to correct a clerical error in its **BAFO** prices did not constitute discussions, showing again that the language in *Allied* may have been overbroad.

“This is particularly true if the government initiated the communication. The fact that the government found it necessary to initiate communications with an offeror creates the presumption that the communication was necessary to determine the acceptability of the offeror’s proposal and therefore constituted discussions.

b. What Constitutes the Lowest Cost or Price to the Government?

The determination as to whether discussions have occurred can sometimes be a difficult one. However, the requirement that the award result in the lowest cost to the government can be equally problematic. Although, in general, this simply means that award must go to the lowest-priced technically acceptable offer,²¹ the GAO has specifically stated that the government may not make an award on the basis of initial proposals where it is clear that discussions may reasonably be expected to result in an even lower cost.

For instance, in *JGB Enterprises, Inc.*,²² the GAO held that an agency had improperly awarded a contract on the basis of initial proposals where the only thing that kept a lower-priced offeror from being considered technically acceptable was an ambiguity appearing in one of its technical drawings. As the GAO stated, “[t]he ambiguity contained in [the protester’s] drawing appears to be the kind of deficiency that could have been resolved through negotiations.”²³ Because, in the GAO’s view, discussions could reasonably have led to the government’s being able to accept a lower-cost offer, the government was foreclosed from awarding a contract on the basis of initial proposals.²⁴

Similarly, the GAO has recognized, in principle, that a late modification to an initial offer which offers substantial cost savings to the

²¹*See, e.g.*, *Meridian Corporation*, Comp. Gen. Dec. B-228468 (3 Feb. 1988), 88-1 CPD ¶ 105 at 3-4. This standard in itself may not appear obvious from the text of the FAR, 48 C.F.R. § 15.610(a)(3) (1987), which states only that award must “result in the lowest overall cost to the Government at a fair and reasonable price.” One reasonable interpretation of this passage could be that the agency is allowed to award to a higher-priced offeror whose technical advantages will result in an overall cost savings over the life of the contract. However, the GAO has made it quite clear that it interprets the Competition in Contracting Act, 41 U.S.C. § 253B(d)(1)(B) (Supp. III 1985) as allowing award only to the lowest-priced proposal considering only cost and cost-related factors listed in the RFP. *See, e.g.*, *JGB Enterprises, Inc.*, Comp. Gen. Dec. B-225058 (13 Mar. 1987), 87-1 CPD ¶ 283 at 3; *see also* *Training and Information Services, Inc.*, Comp. Gen. Dec. B-225418 (9 Mar. 1987), 87-1 CPD ¶ 266 (finding improper an award on initial proposals where two other technically acceptable offerors had submitted lower-priced offers).

²²Comp. Gen. Dec. B-225058 (13 Mar. 1987), 87-1 CPD ¶ 283.

²³*Id.* at 3.

²⁴*See also* *Hartridge Equipment Corporation*, Comp. Gen. Dec. B-228303 (15 Jan. 1988), 88-1 CPD ¶ 39 (“Here we think it should have been evident to the Army that the initial proposal it accepted did not necessarily represent the lowest cost to the government.”). However, it must be reasonably apparent to the government on the face of the initial proposals that discussions would result in another proposal becoming lower in cost. *See, e.g.*, *Coventry Climax Engines, Ltd.*, Comp. Gen. Dec. B-228318 (25 Jan. 1988), 88-1 CPD ¶ 66 at 3.

government may require the government to enter into discussions.²⁵ However, in the same decision the GAO recognized that the government's interests in a timely contract award must also be given some consideration. In short, there is no pat formula for identifying when the government may properly award on initial proposals—the determination rests upon such myriad factors as the extent of discussions that would be required to realize the cost savings, the likelihood that such discussions will result in a lower-priced, technically acceptable offer,²⁶ the magnitude of the potential savings, and the government's interest in a timely contract award. It is probably safe to conclude, however, that the award should not be made on the basis of initial proposals where it appears reasonably certain that discussions will result in the government being able to accept a significantly lower-cost proposal.

B. MEANINGFUL DISCUSSIONS AS DEFINED BY THE GENERAL ACCOUNTING OFFICE

To begin with, it might be helpful to provide a simple recitation of the standards developed by the GAO in this area.

The GAO has stated that for discussions to be meaningful they must identify the following in an offeror's proposal: deficiencies;²⁷ weaknesses;²⁸ excesses;²⁹ informational deficiencies (omissions);³⁰ errors;³¹ and prices that are either in excess of the government esti-

²⁵See *Microphor, Inc.*, Comp. Gen. Dec. B-224264 (11 Feb. 1987), 87-1 CPD ¶ 148 at 3. Although recognizing in principle that a late price reduction could in some circumstances constrain the government's right to award on initial proposals, in this instance the GAO denied the protest where the late modification was transmitted to the contracting officer more than five weeks after initial proposals were received and the proposed reduction represented only a 7.58 savings.

²⁶Both *JGB Enterprises* and *Microphor* involved situations where relatively simple discussions would almost certainly have resulted in a lower cost offer that the government could accept.

²⁷See, e.g., *TM Systems, Inc.*, Comp. Gen. Dec. B-228220 (10 Dec. 1987), 87-2 CPD ¶ 573 at 4.

²⁸*Id.*

²⁹*Id.*

³⁰See, e.g., *B.K. Dynamics, Inc.*, Comp. Gen. Dec. B-228090 (2 Nov. 1987), 87-2 CPD ¶ 429 at 3, *aff'd on reconsideration*, Comp. Gen. Dec. B-228090.2 (18 Feb. 1988), 88-1 CPD ¶ 165; *Sperry Corporation*, Comp. Gen. Dec. B-220521 (13 Jan. 1986), 86-1 CPD ¶ 28 at 6-7; *Furuno U.S.A., Inc.*, Comp. Gen. Dec. B-221814 (24 Apr. 1986), 86-1 CPD ¶ 400. *But see* *National Council of Teachers of English*, Comp. Gen. Dec. B-230699 (5 July 1988), 88-2 CPD ¶ 6 at 7 ("offerors are responsible for the preparation and context of their proposals, and contracting agencies are not obligated to go in search of information needed to complete proposals").

³¹See, e.g., *Centel Business Systems*, Comp. Gen. Dec. B-229059 (24 Dec. 1987), 87-2 CPD ¶ 629 at 4 ("Where an agency fails to resolve a proposal error that it should have

mate or are considered to be unreasonable.³² In doing so, agencies need only “generally . . . lead offerors into the areas of their proposals which require amplification,”³³ yet discussions are supposed to be “as specific as practical considerations will permit.”³⁴

Even though the GAO has held that discussions must point out all deficiencies, weaknesses, excesses, errors, and gross overpricing in as specific a manner as practical, it has also stated that “agencies are not obligated to afford offerors all-encompassing discussions.”³⁵ Specifically, meaningful discussions need not: 1) tell offerors every area of their proposals in which they did not receive the maximum number of points;³⁶ 2) identify deficiencies of a nature that cannot be corrected through discussions;³⁷ 3) identify weaknesses or deficiencies that are so inherent in the offeror’s approach that they cannot be corrected without substantial revisions to the offeror’s proposal;³⁸ 4) discuss weaknesses or deficiencies first introduced into a previously

reasonably detected and which materially prejudices an offeror, the agency has failed in its obligation to conduct meaningful discussions.”); *but see* Intelcom Support Services, Inc., Comp. Gen. Dec. **B-225600** (7 May 1987), **87-1 CPD ¶ 487** (agency not expected to discover and discuss discrepancy between offeror’s cost and technical proposals where solicitation specifically stated the two would be evaluated by different people).

³²*See, e.g.*, The Faxon Company, Comp. Gen. Dec. **B-227835.3 et al.** (2 Nov. 1987), **87-2 CPD ¶ 425**; Education Development Center, Inc., Comp. Gen. Dec. **B-224205** (30 Jan. 1987), **87-1 CPD ¶ 99**; Meridian Junior College, Comp. Gen. Dec. **B-221358** (17 Mar. 1986), **86-1 CPD ¶ 262** at **3**. *But see* Individual Development Associates, Inc., Comp. Gen. Dec. **B-225595** (16 Mar. 1987), **87-1 CPD ¶ 290** (affirming this general rule but not applying it where evidence showed protester was itself aware of its high price).

³³*TM Systems, Inc.*, Comp. Gen. Dec. **B-228220** (10 Dec. 1987), **87-2 CPD ¶ 573** at **4**.

³⁴*Id.*

³⁵*Id.*

³⁶*See, e.g.*, Automation Management Consultants, Inc., Comp. Gen. Dec. **B-231540** (12 Aug. 1988), **88-2 CPD ¶ 145**; Varian Associates, Inc., Comp. Gen. Dec. **B-228545** (16 Feb. 1988), **88-1 CPD ¶ 153** at **5**; Structural Analysis Technologies, Inc., Comp. Gen. Dec. **B-228020** (9 Nov. 1987), **87-2 CPD ¶ 466**; Universal Shipping Company, Inc.—Request for Reconsideration, Comp. Gen. Dec. **B-223905.3 et al.** (4 Aug. 1987), **87-2 CPD ¶ 125**; Comarco, Inc., Comp. Gen. Dec. **B-225504 et al.** (18 Mar. 1987), **87-1 CPD ¶ 305**.

³⁷*See, e.g.*, Runyan Machine and Boiler Work, Inc., Comp. Gen. Dec. **B-227069** (19 Aug. 1987), **87-2 CPD ¶ 177** (deficiency was offeror’s proposed place of performance, which presumably could not be changed); Chemicon International, Comp. Gen. Dec. **B-222793** (6 Aug. 1986), **86-2 CPD ¶ 161** at **5** (weakness was in area of experience—which protester presumably could not increase even if discussions were held).

³⁸*See, e.g.*, Advanced Technology Systems, Comp. Gen. Dec. **B-221068** (17 Mar. 1986), **86-1 CPD ¶ 260** at **7**; Advanced Technology Systems, Comp. Gen. Dec. **B-221068** (17 Mar. 1986), **86-1 CPD ¶ 260** at **7**. Unfortunately, there is no test for determining when a revision would be so “major” that discussions are not required. One possible standard suggested by an agency—the amount the offeror would have to spend to revise its proposal—was rejected out of hand by the GAO as “not germane” to the issue of whether discussions were required. *See* Furuno U.S.A., Inc., Comp. Gen. Dec. **B-221814** (24 Apr. 1986), **86-1 CPD ¶ 400** at **7 n.5**.

acceptable proposal at the best-and-final-offer (BAFO) stage;³⁹ 5) notify an offeror whose proposed price or cost is within the government estimate that its proposed cost or price is not competitive with other offerors;⁴⁰ 6) discuss the same weakness or deficiency more than once;⁴¹ or 7) discuss a specific exception taken by the offeror to a material solicitation requirement.⁴² It is the process of reconciling these various standards that will be the focus of the remainder of this article.

C. MAKING SENSE OF THE GAO STANDARDS

In essence, the GAO has set up two lines of legal reasoning. One essentially says that contracting officers must discuss every defect in an offeror's proposal,⁴³ and that discussions must be as specific as is practical. The other says that there are numerous instances where contracting officers need not discuss every defect in any offeror's proposal, and that contracting officers need only ask general questions that "lead" offerors into areas of their proposals needing amplification. How does the GAO choose which line of reasoning to apply to a particular protest?

This question can be answered only by reading and analyzing the GAO decisions in the area. To start with, there is a small class of decisions of limited usefulness in which the protester admits that the agency held specific discussions with it but claims that the agency is under a continuing duty to notify it if the revised proposal remained

³⁹See, e.g., Associated Chemical and Environmental Services, Comp. Gen. Dec. B-228411.3 (10 Mar. 1988), 88-1 CPD ¶ 248 at 15-16; Comarco, Inc., Comp. Gen. Dec. B-225504 *et al.* (18 Mar. 1987), 87-1 CPD ¶ 305; Telecommunications Specialists, Inc., Comp. Gen. Dec. B-224842.2 (26 Feb. 1987), 87-1 CPD ¶ 221 at 4.

⁴⁰See, e.g., Associated Chemical and Environmental Services, Comp. Gen. Dec. B-228411.3 (10 Mar. 1988), 88-1 CPD ¶ 248 at 14; State Technical Institute at Memphis, Comp. Gen. Dec. B-229695; B-229695.2 (10 Feb. 1988), 88-1 CPD ¶ 135; The Faxon Company, Comp. Gen. Dec. B-227835.3 *et al.* (2 Nov. 1987), 87-2 CPD ¶ 425 at 5.

⁴¹See, e.g., Strategica, Inc., Comp. Gen. Dec. B-227921 (27 Oct. 1987), 87-2 CPD ¶ 399 ("we are not aware of any such requirement"); Creativision, Inc., Comp. Gen. Dec. B-225829 (24 July 1987), 87-2 CPD 778; Miller Printing Equipment Corp., Comp. Gen. Dec. B-225447.2 (24 Mar. 1987), 87-1 CPD 7337 at 7-8 ("We think [protester] essentially expected the contracting officer to engage in technical leveling.").

⁴²See, e.g., Computervision Corporation, Comp. Gen. Dec. B-224198 (28 Nov. 1986), 86-2 CPD 7617 at 5 ("we do not believe that an explicit exception taken by an offeror in its proposal to a solicitation requirement represents a deficiency that must be addressed through discussions").

⁴³For purposes of this discussion, the term "defect" will be used to encompass any aspect of an offeror's proposal that is considered less than perfect by the evaluating agency.

weak or deficient in the areas discussed. As noted above, the GAO has rejected such claims and has stated that agencies fulfill the requirement for meaningful discussions by pointing out just once each weakness or deficiency.⁴⁴ In fact, discussing the same weakness or deficiency more than once might constitute prohibited technical leveling.

Another, larger class of decisions which are of equally limited usefulness are those in which the protester claims that the agency failed to hold specific discussions covering every defect in the protester's proposal, but the record shows that the agency did provide such all-encompassing discussions.⁴⁵ These decisions are of limited usefulness for our purposes, because the GAO treats them as essentially factual disputes—the GAO finds that the agency engaged in the maximum possible discussions with the protester and there is therefore no reason to elaborate on the extent of discussions legally required to fulfill the requirement for meaningful discussions.

Of more value to this article are those decisions where the record shows that the agency clearly did not discuss all of the specific features that caused the offeror's proposal to be downgraded in the evaluation. In these situations the GAO is forced to articulate its view of how extensive discussions must be for them to be "meaningful."

I. Failure To Hold Any Technical Discussions

At one extreme are the situations in which the agency conducted only cost discussions with the protester. For instance, in *B.K. Dynamics, Inc.*,⁴⁶ the GAO held that an agency had failed to conduct meaningful discussions where it held no technical discussions with any offeror but simply requested best and final offers after reviewing the initial proposals. The GAO stated that the "failure to discuss

⁴⁴It should be noted that agencies cannot "lead an offeror to believe incorrectly that a perceived deficiency has been resolved as a result of discussions." *Strategica, Inc.*, Comp. Gen. Dec. B-227921 (27 Oct. 1987), 87-2 CPD ¶ 399 at 4. Thus an agency is under no obligation to volunteer that a proposal remains weak, but if asked a specific question by the offeror the agency cannot incorrectly assure the offeror that its proposal is no longer weak after revisions. However, it seems certain that the agency could simply refuse to respond to any such inquiry, particularly if no further discussions are contemplated with offerors.

⁴⁵See, e.g., *The Earth Technology Corp.*, Comp. Gen. Dec. B-230980 (4 Aug. 1988), 88-2 CPD ¶ 113; *Jones & Company, Natural Resource Engineers*, Comp. Gen. Dec. B-228971 (4 Dec. 1987), 87-2 CPD ¶ 555; *Diversified Contract Services, Inc.*, Comp. Gen. Dec. B-227555.3 (25 Nov. 1987), 87-2 CPD ¶ 516; *Tri-Ex Tower Corporation*, Comp. Gen. Dec. B-228012 (9 Nov. 1987), 87-2 CPD ¶ 465; *Northwest Regional Educational Laboratory*, Comp. Gen. Dec. B-222591.3 (21 Jan. 1987), 87-1 CPD ¶ 74.

⁴⁶Comp. Gen. Dec. B-228090 (2 Nov. 1987), 87-2 CPD 7429, *aff'd on reconsideration*, Comp. Gen. Dec. B-228090.2 (18 Feb. 1988), 88-1 CPD ¶ 165.

technical matters was proper only if [protester's] initial technical proposal contained no uncertainties or weaknesses."⁴⁷

It is interesting to note that in *B.K. Dynamics* the agency tried to invoke two of the exceptions to the discussion requirement that the GAO often articulates — the agency claimed that there were no technical uncertainties in the protester's proposal that required discussions, and that the proposal could not have been improved without major revisions. The GAO, however, conducted its own review of the evaluation materials and identified specific areas where the protester had been downgraded, which constituted "omissions . . . of the type that may well have been resolved through discussions."⁴⁸

Similarly, in *Motorola, Inc.*,⁴⁹ the GAO found that an agency that conducted discussions with one offeror in the competitive range but not with the other had failed to meet its obligation to conduct meaningful discussions. Unlike the *B.K. Dynamics* decision, in *Motorola* the GAO specifically found that allowing the protester to submit a revised proposal "could have affected the outcome of the competition,"⁵⁰ and thus sustained the protest.

Compare these decisions, however, with the language that the GAO used in *Metron Corporation*,⁵¹ in which the GAO stated that "an agency's decision not to engage in technical discussions is unobjectionable where a proposal contains no technical uncertainties."⁵² Somewhat similar language was used in *Martin Advertising Agency, Inc.*,⁵³ in which the GAO stated that, because there were no deficiencies or uncertainties in the protester's technically acceptable proposal, the agency was under no obligation to conduct technical discussion . . . ~ ~

⁴⁷*Id.* at 3.

⁴⁸However, having gone to the trouble of finding that the agency had not conducted meaningful discussions, the GAO then found that the protester had not shown any prejudice from the violation because it had not shown that meaningful discussions would have improved its proposal sufficiently to raise it to the level of the awardee's. Thus, although finding that the agency had not conducted meaningful discussions, the GAO denied the protest. See *id.* at 3-4. *But see* *Jones & Company, Comp. Gen. Dec. B-224914* (24 Feb. 1987), 87-1 CPD ¶ 201, which presented a situation identical to that in *B.K. Dynamics*. However, in *Jones* the GAO sustained the protest without discussing prejudice, noting only that "the evaluation sheets . . . demonstrate many areas in which additional information from Jones would have improved its rating. . . . We conclude that the omissions and weaknesses noted by the evaluators were, in large part, suitable for correction, thus requiring that [the agency] conduct technical discussions." *Jones & Company*, 87-1 CPD ¶ 201 at 4.

⁴⁹Comp. Gen. Dec. B-225822 (17 June 1987), 87-1 CPD ¶ 604.

⁵⁰*Id.* at 5.

⁵¹Comp. Gen. Dec. B-227014 (29 June 1987), 87-1 CPD ¶ 642.

⁵²*Id.* at 5.

⁵³Comp. Gen. Dec. B-225347 (13 Mar. 1987), 87-1 CPD ¶ 285.

⁵⁴*Id.* at 4.

How do we reconcile decisions that essentially say that agencies must discuss every deficiency, weakness, or excess with decisions such as *Metron* and *Martin Advertising*? *Metron* is fairly easy to explain. The statement that technical discussions are not required where a proposal contains no technical uncertainties is based upon a standard that was developed prior to the passage of the Competition in Contracting Act but which has had increasingly diminishing application.⁵⁵ Although this may have been the applicable standard at one time, and although it has been cited and used as recently as 1986,⁵⁶ it seems unlikely that anyone at the GAO would seriously maintain at this point that an agency is under no obligation to hold technical discussions with an offeror simply because there are no “uncertainties” in that offeror’s proposal.⁵⁷ Indeed, in *Training and Information Services, Inc.*, the agency argued “that it had no questions about the offeror’s technical approaches or prices and thus discussions were not required.”⁵⁸ In response, GAO stated: “This position has no merit. Neither the CICA nor the Federal Acquisition Regulation recognizes any such exception to the general requirement that discussions be conducted.”⁵⁹

Nor did the *Metron* decision actually rely on the statement that discussions were not required where there were no technical uncertainties. The GAO specifically noted that both proposals were “very thorough and very well written,” both proposals received outstanding

⁵⁵See, e.g., *Information Management, Inc.*, Comp. Gen. Dec. B-212358 (17 Jan. 1984), 84-1 CPD ¶ 76 at 6-7 (the mere request for BAFO’s satisfies the discussion requirement unless there are uncertainties with respect to the technical aspects of a proposal).

⁵⁶See *Mount Pleasant Hospital*, Comp. Gen. Dec. B-222364 (13 June 1986), 86-1 CPD ¶ 549 at 4 (“we have held that a request for best and final offers itself constitutes appropriate discussions where a proposal contains no technical uncertainties”); *Meridian Junior College*, Comp. Gen. Dec. B-221358 (17 Mar. 1986), 86-1 CPD ¶ 262 at 3 (request for BAFO’s satisfied requirement for discussions where “proposal was devoid of technical uncertainties” and price was reasonable). For a case of truly poor drafting in this area, see *Radiation Systems, Inc.*, Comp. Gen. Dec. B-222585.2 (6 June 1986), 86-1 CPD ¶ 534 at 2, which states without qualification the proposition “that a mere request for best and final offers is sufficient to satisfy the requirement for discussions.” Fortunately, this declaration was not used to decide the protest, which was actually dismissed as untimely.

⁵⁷This statement would not be accurate if the term “uncertainties” was intended to encompass the concepts of weaknesses, deficiencies, and excesses. If that is the case, the GAO needs to say so explicitly, since, for most of us, the term “uncertainty” covers only that situation where the agency does not understand something in the offeror’s proposal (as opposed to the situation where the agency understands perfectly what the proposal says, but finds it weak or deficient).

⁵⁸Comp. Gen. Dec. B-225418 (9 Mar. 1987), 87-1 CPD ¶ 1266.

⁵⁹*Id.* at 5. The GAO went on to note that the evaluation of the protester’s proposal had identified weaknesses “which could appropriately have been the subject of discussions, as a result of which [the protester’s] technical score could have improved significantly.” *Id.*

ratings, the contracting officer determined that there were no significant deficiencies in either proposal, and the “weaknesses” in the protester’s proposal amounted to “minor and insignificant detail,” the correction of which would not have “appreciably improved [protester’s] technical rating.”⁶⁰

In fact, the GAO noted that the contracting officer found the two proposals to be essentially technically equal and made his source selection on the basis of price. Thus, far from relying on a standard requiring discussions only where there are technical uncertainties, the GAO made a specific finding that there were no deficiencies, weaknesses or excesses in the protester’s proposal that required discussion and that the lack of discussions did not competitively prejudice the protester.

Far more difficult to explain is the *Martin Advertising* decision. In that protest, two offerors were in the competitive range. The agency held extensive and very specific discussions with the awardee, but held no technical discussions with the protester, who was also the incumbent. The GAO stated that, because the agency considered the protester’s proposal “to have met the agency’s requirements and to be technically acceptable, . . . there were no deficiencies or uncertainties that required discussions. In evaluating the relative merits of the firms’ proposals, the [agency] concluded that [protester’s] proposal simply was inferior to [the awardee’s].”⁶¹

If this language were to be believed, it would mean that agencies are under no obligation to hold discussions with a technically acceptable offeror unless the agency had questions regarding the offeror’s proposal. Nor is there any indication in the decision that, despite the broad language, the GAO actually found that discussions would not have affected the outcome of the procurement.⁶² The entire concept of discussing weaknesses—of providing offerors with a fair and reasonable chance to improve their proposals—is absent from this decision.⁶³

⁶⁰*Metron Corporation*, 87-1 CPD ¶ 642 at 5.

⁶¹*Martin Advertising*, 87-1 CPD ¶ 285 at 4.

⁶²There is always the possibility that the record supported such a determination and this is what really underlies the outcome. However, this is not reflected in the written decision. In fact, it is impossible to tell from the decision whether there was a very large point difference between the two offerors, which might support a determination that discussions would not have altered the result, or a very small point difference, which would make the decision consistent with other decisions stating that not every area in which the offeror lost a few points need be discussed.

⁶³For similarly puzzling language, see *Varian Associates, Inc.*, Comp. Gen. Dec. B-228545 (16 Feb. 1988), 88-1 CPD ¶ 153 at 6, in which the GAO states: “In any case, it

Contract attorneys simply cannot safely rely on either the facts of *Martin Advertising*, which is best regarded as an aberration, or the outdated legal standard that the GAO cited in *Metron*. Given the outcome and language of decisions such as *Training and Information Services*, it seems that there are only very narrow circumstances in which an agency may safely determine not to hold any technical discussions with an offeror in the competitive range. This would include cases where the offeror's proposal is so good that it really has no weaknesses, deficiencies, omissions, errors, or excesses.

Nor should practitioners place undue reliance on the B.K. *Dynamics* decision,⁶⁴ unless the agency can show convincingly that conducting technical discussions would not have affected the outcome of the procurement. Although that decision seems to place the burden on the protester to show prejudice,⁶⁵ other decisions seem to indicate that the GAO will not place the burden on the protester.⁶⁶ To be safe, agencies should assume that once it is established that the agency failed to conduct meaningful discussions, the burden is on the agency to show that the failure resulted in no prejudice to the protester.

2. Holding Only Partial Technical Discussions

The largest class of protests in this area consists of those situations where the agency held some technical discussions with the protester, but the protester believes that those discussions were inadequate. The issue, then, is how extensive discussions must be before they are "meaningful."

should be emphasized that [the allegedly undiscussed matter] was viewed as a relative weakness in Varian's approach and not a deficiency that would render Varian's proposal unacceptable." Such language ignores the rather large number of GAO decisions stating that weaknesses as well as deficiencies must be discussed.

⁶⁴See *supra* notes 46-48 and accompanying text.

⁶⁵This is particularly evident in the GAO's treatment of the protester's request for reconsideration, in which the GAO stated:

[W]e think it important that, before we disturb a procurement or a contract, there be some evidence, especially where price or cost is an important selection factor, that the protester would have been competitive with the awardee but for the agency's action. Neither the record on B.K.'s protest, nor the firm's reconsideration request, persuades us that this would have been the case here.

B.K. Dynamics, Inc.—Reconsideration, Comp. Gen. Dec. B-228090.2 (18 Feb. 1988), 88-1 CPD ¶ 165 at 2 (citations omitted). Under this standard, the protester must come forward with specific evidence that it has suffered prejudice by the failure to conduct discussions. The GAO employed a similar standard in *Southeastern Center for Electrical Engineering Education*, Comp. Gen. Dec. B-230692 (6 July 1988), 88-2 CPD ¶ 13, finding that the alleged lack of discussions could not have prejudiced the protester, because it did not affirmatively state how it would have improved its proposal.

⁶⁶See, e.g., *Jones & Company*, Comp. Gen. Dec. B-224914 (24 Feb. 1987), 87-1 CPD ¶ 201.

The GAO has stated that “once discussions [are] opened, the agency must point out all deficiencies in the offeror’s proposal and not merely selected areas.”⁶⁷ Thus, in *TM Systems*,⁶⁸ the GAO found that the agency had failed to conduct meaningful discussions where the agency had found specific deficiencies in several areas of the protester’s proposal but had only notified the protester of one of those deficiencies.⁶⁹ Similarly, in *Avitech*⁷⁰ and in *Princeton Gamma-Tech, Inc.*⁷¹ the GAO found that the agency had failed to conduct meaningful discussions where it discussed only some of the deficiencies identified in the protester’s proposal.⁷²

In other cases, however, the GAO has stated that agencies are not required to afford offerors “all-encompassing” discussions and has, as noted above, carved out a rather large number of specific categories of proposal defects that do not require discussion. For instance, in a number of protests the GAO found that, where the agency had discussed the main weakness in an offeror’s proposal, it was not required

⁶⁷*TM Systems, Inc., Comp. Gen. Dec. B-228220 (10 Dec. 1987), 87-2 CPD ¶ 573 at 5.* It is unfortunate that the GAO does not define and use its terms with more specificity. Thus, the GAO has not provided a clear articulation of the difference between the terms “weakness” and “deficiency.” However, as the term is most often used by the GAO, a “deficiency” is perhaps best defined as a defect in a proposal that renders that proposal technically unacceptable. This concept includes both major deficiencies (serious defects in the proposal) and minor deficiencies, such as a failure to provide some easily supplied item of information necessary to perform a complete evaluation of the proposal, or a failure to comply with a relatively minor (although still mandatory) solicitation requirement. The term “weakness” is slightly harder to pin down. Perhaps the best definition is that a “weakness” consists of any aspect of an offeror’s proposal that, while not rendering the proposal technically unacceptable, is viewed by the evaluators unfavorably — or perhaps even as simply average. Unfortunately, the GAO has confused the area by sporadically using the terms interchangeably. See, for instance, the analysis that appears in *Price Waterhouse, Comp. Gen. Dec. B-222562 (18 Aug. 1986), 86-2 CPD ¶ 190 at 5.* The GAO could go far toward clarifying this area of the law simply by being more precise in its language.

⁶⁸*Comp. Gen. Dec. B-228220 (10 Dec. 1987), 87-2 CPD ¶ 573 at 5.*

⁶⁹Although the GAO found that meaningful discussions had not been held, it also found that the lack of meaningful discussions had not prejudiced the protester and thus denied the protest.

⁷⁰*Comp. Gen. Dec. B-223203.2 (27 Mar. 1987), 87-1 CPD ¶ 351.*

⁷¹*Comp. Gen. Dec. B-228052.2 (17 Feb. 1988), 88-1 CPD ¶ 175 at 6.*

⁷²The GAO did not conduct a prejudice analysis in these protests as it did in *TM Systems*. However, it did note in *Avitech* that the contracting officer found the protester to be technically unacceptable on the basis of the deficiency that was never discussed. Given that determination by the contracting officer, it seems reasonable to assume that discussion of the deficiency could have made the protester technically acceptable and thus could have altered the outcome of the source selection decision. In *Princeton Gamma-Tech* the GAO noted only that the protester had been “downgraded” for the deficiencies which were not discussed, without analyzing whether this downgrading had any impact on the outcome of the procurement (perhaps because the failure to hold meaningful discussions was only one of several grounds on which the protest was sustained).

to discuss every other concern it had with the proposal.⁷³ Similarly, the GAO has stated on numerous occasions that agencies are not required to discuss every aspect of an offeror's proposal that received less than the maximum number of points.

How do we reconcile these conflicting standards— one of which says that everything must be discussed and the other which says that everything need not be discussed? If we look at the facts underlying the decisions in this area, a pattern emerges. With the exception of a few matters that never need to be discussed,⁷⁴ the GAO will find that the agency failed to conduct meaningful discussions if an improvement in the proposal area that was not discussed could reasonably have led to the protester's selection for contract award. Conversely, the GAO will find that meaningful discussions were held (or at least deny the protest) if the areas that were not discussed had no realistic impact on the source selection decision.

In some decisions this type of analysis is expressly articulated. Thus, in *Dynalectron Corporation—PacOrd, Inc.*,⁷⁵ the GAO specifically noted that “even if [the protester] received the maximum technical score on all three factors [that were not discussed with it] it would not have changed [protester's] technical ranking as fourth high and, therefore, [protester] was not prejudiced as the result of not being advised of these relatively minor inadequacies.”⁷⁶ Conversely, the GAO has found that no meaningful discussions were held where additional discussions “could have affected the outcome of the procurement.”⁷⁷

Probably the clearest expression of this philosophy is contained in *Computervision Corporation*, in which the GAO stated:

⁷³See, e.g., *Structural Analysis Technologies, Inc.*, Comp. Gen. Dec. B-228020 (9 Nov. 1987), 87-2 CPD ¶ 466 (agency adequately discussed its “primary” concerns with the proposal); *Universal Shipping Company, Inc.—Request for Reconsideration*, Comp. Gen. Dec. B-223905.3; B-223905.4 (4 Aug. 1987), 87-2 CPD ¶ 125 (“the discussions exposed [the agency's] major concerns with [protester's] proposal”); *Comarco, Inc.*, Comp. Gen. Dec. B-225504; B-225504.2 (18 Mar. 1987), 87-1 CPD ¶ 305 at 4 (“when an agency fails to notify an offeror of the central weakness of an offer, it has failed to hold meaningful discussions”).

⁷⁴Examples include defects first appearing in an offeror's BAFO, specific exceptions taken to solicitation provisions, and noncompetitive prices that are not considered unreasonable or beyond the government estimate.

⁷⁵Comp. Gen. Dec. B-217472 (18 Mar. 1985), 85-1 CPD 1321.

⁷⁶*Id.* at 3.

⁷⁷*Motorola, Inc.*, Comp. Gen. Dec. B-225822 (17 June 1987), 87-1 CPD ¶ 604 at 5; see also *Furuno U.S.A., Inc.*, Comp. Gen. Dec. B-221814 (24 Apr. 1986), 86-1 CPD 1400 (difference between protester's technical score and awardee's technical score “almost entirely attributable” to informational deficiencies that were not discussed).

An information or technical deficiency in a proposal is the proper subject for discussions and reasonably must be brought to the attention of the offeror involved to allow for proposal revision because this action will give the firm an opportunity to satisfy the government's requirements. The essence of this principle is that it would be unfair to an offeror and detrimental to full and open competition for a procuring agency to downgrade or reject a proposal which otherwise would have a reasonable chance of being selected for award but for a deficient aspect of the proposal of which the offeror is legitimately unaware.⁷⁸

Even where the GAO does not make such explicit statements, we can usually infer that it has applied such a standard. For instance, in those decisions in which the GAO found it acceptable that the agency discussed only its "primary concern" or the proposal's "central weakness" with the protester, the protesters had failed to address these primary concerns to the satisfaction of the agency, precluding any chance of an award to the protester. The GAO in these protests was probably satisfied that discussion of other areas in which the protester lost points would not have affected the source selection decision.⁷⁹

Thus, the blanket statement that "not every aspect of a proposal that received less than the maximum number of points need be discussed" is too broad to be completely accurate, as is the statement that "every weakness or deficiency must be discussed." The standard that GAO actually applies is somewhere between the two: all areas in which a proposal did not receive maximum points must be discussed, unless discussion of those areas would not affect the outcome of the procurement."

⁷⁸Comp. Gen. Dec. B-224198 (28 Nov. 1986), 86-2 CPD 1617 at 5.

⁷⁹See, e.g., Structural Analysis Technologies, Inc., Comp. Gen. Dec. B-228020 (9 Nov. 1987), 87-2 CPD ¶ 466; Universal Shipping Company, Inc.—Request for Reconsideration, Comp. Gen. Dec. B-223905.3; B-223905.4 (4 Aug. 1987), 87-2 CPD ¶ 125; Metron Corporation, Comp. Gen. Dec. B-227014 (29 June 1987), 87-1 CPD ¶ 642; Comarco, Inc., Comp. Gen. Dec. B-225504; B-225504.2 (18 Mar. 1987), 87-1 CPD ¶ 305; Tidewater Health Evaluation Center, Inc., Comp. Gen. Dec. B-223635.3 (17 Nov. 1986), 86-2 CPD ¶ 563.

"Depending on the nature of the defect, this can be a difficult test to apply prospectively. Agencies that discuss only the central weakness of an offeror's proposal and not other, less important, weaknesses, run the risk of having the offeror satisfactorily address that central weakness. In that event, the agency might find itself in the position of having to reopen discussions to discuss those other weaknesses that could now be crucial to the source selection decision. Thus, from a practical standpoint, it would be far better to simply engage in comprehensive discussions during the first round of discussions.

In a series of recent decisions, however, the GAO has specifically divorced the prejudice analysis from the meaningful discussion analysis. In these decisions, the GAO has found either that the agency failed to conduct meaningful discussions and only then denied the protest because the failure had not prejudiced the protester,” or that it is unnecessary to even reach the issue of meaningful discussions because the protester would not have been in line for award even if discussions had been held.”

These decisions differ from the earlier decisions in the area, many of which subsumed the prejudice analysis within the meaningful discussions analysis. If these newer decisions become the predominant analysis for meaningful discussions at the GAO, it may mean that the GAO will tighten its concept of meaningful discussions and find more instances where agencies have failed to conduct them. Even if this occurs, however, the new analysis should not result in any greater number of protests being sustained, because even if the GAO finds a technical violation of the regulation, it will not sustain the protest unless that violation caused the protester actual competitive prejudice.

D. THE ISSUES OF TECHNICAL LEVELING AND TECHNICAL TRANSFUSION

Before leaving the realm of GAO decisional law, it is worthwhile to discuss briefly the issues of technical leveling and technical transfusion—the two reasons agencies most commonly cite for their failure to engage in “all-encompassing” discussions.

For the contracting officer who is unfamiliar with GAO decisions, the most important guideline to follow with discussions is contained in the Federal Acquisition Regulation—the proscription against

⁸¹See, e.g., *Levine Associates, Inc., Comp. Gen. Dec. B-228543* (5 Feb. 1988), 88-1 CPD ¶ 117; *Data Resources, Comp. Gen. Dec. B-228494* (1 Feb. 1988), 88-1 CPD ¶ 94 at 6 (“Even if we concluded that there was a lack of meaningful discussions we would sustain the protest only if the protester demonstrated that it was prejudiced by the government’s actions.”); *TM Systems, Comp. Gen. Dec. B-228220* (10 Dec. 1987), 87-2 CPD ¶ 573.

⁸²For instance, in *American District Telegraph Company, Comp. Gen. Dec. B-228308* (22 Jan. 1988), 88-1 CPD ¶ 59, the GAO avoided deciding whether the agency had held meaningful discussions by finding that, even if the contested issue had been discussed, it would not have affected the outcome of the procurement. Similar language appears in *Southeastern Center for Electrical Engineering Education, Comp. Gen. Dec. B-230692* (6 July 1988), 88-2 CPD ¶ 13 (“Therefore, [protester] was not prejudiced, in any case, if there was a failure to point out all major weaknesses during discussions.”).

technical leveling and technical transfusion.⁸³ Many contracting officers believe that telling a particular offeror in detail all of its proposal defects is tantamount to technical leveling. The GAO does not subscribe to this view, however.

In decision after decision the GAO has stated categorically that technical leveling cannot occur where the agency discusses an offeror's own proposal defects with it on only one occasion. For instance, in *Price Waterhouse*,⁸⁴ the GAO specifically stated that

technical leveling arises only where, as the result of *successive* rounds of discussions, the agency has helped to bring one proposal up to the level of other proposals by pointing out inherent weaknesses that remain in the proposal because of the offeror's own lack of diligence, competence or inventiveness after having been given an opportunity to correct them.⁸⁵

Thus, a contracting officer cannot ever successfully invoke the prohibition against technical leveling as support for a decision not to discuss an offeror's own proposal defects with it. Similarly, the prohibition against technical transfusion is inapplicable because, for the GAO, technical transfusion consists only of transferring information regarding one offeror's proposal to another offeror.⁸⁶ This leaves agencies with no legal prohibition against discussing an offeror's own proposal defects with it at least once.

111. TIPS FOR THE CONTRACT ATTORNEY

A. A MORE WORKABLE STANDARD OF MEANINGFUL DISCUSSIONS

This article has reviewed the myriad ways in which the GAO has sought to characterize those items that must be discussed, as well as

⁸³See FAR, 48 C.F.R. § 15.610(d) (1987).

⁸⁴Comp. Gen. Dec. B-222562 (18 Aug. 1986), 86-2 CPD ¶ 190.

⁸⁵*Id.* at 5-6 (emphasis in original). See also *Aviation Contractor Employees, Inc.*, Comp. Gen. Dec. B-225964 (30 Mar. 1987), 87-1 CPD ¶ 363 at 4 ("the concept of technical leveling generally involves helping an offeror to bring its proposal up to the level of other proposals through *repeated* rounds of discussions") (emphasis in original). Earlier language in the *Price Waterhouse* decision as well as some other decisions seems to indicate that technical leveling occurs where the agency discusses with an offeror a "weakness or deficiency . . . inherent in the proposed approach or caused by a lack of diligence or competence." *Price Waterhouse*, 86-2 CPD ¶ 190 at 4. However, a footnote to that very sentence again notes that technical leveling occurs only through "successive rounds of discussions." Thus, the fear of technical leveling does not provide a legitimate excuse for not discussing with an offeror defects of this type during the first round of discussions.

⁸⁶See, e.g., *Applied Mathematics, Inc.*, Comp. Gen. Dec. B-227930 (26 Oct. 1987), 87-2 CPD ¶ 395 at 3 n.2.

those that need not be discussed. As we have seen, these standards, standing alone, are both potentially contradictory and difficult to apply prospectively.⁸⁷ For those reasons they provide insufficient predictive power for the contract attorney who must determine before approving a contract award whether meaningful discussions were held with all offerors.

Rather than concentrate on these articulated standards, contract lawyers who are concerned about determining the propriety of a proposed contract award should focus on one general principle: offerors who have demonstrated an adequate ability to respond to the solicitation should be afforded one (and only one) reasonable opportunity to address defects in their initial proposals where allowing them that opportunity might reasonably affect the outcome of the procurement.

This general principle explains the outcome of almost all of the recent GAO decisions in this area,⁸⁸ and is probably a more accurate guide to predicting whether a protest will be sustained than the specific standards that the GAO has articulated. In any event, it is certainly safe to use this principle to decide the extent of discussions necessary during a negotiated procurement." It seems risky, at best, to use the narrow and erratically applied GAO standards to determine the extent of discussions necessary, and these standards are perhaps best reserved for defending a protested procurement.

The principle articulated above, however, cannot explain the GAO's position regarding the discussion of price. The GAO requires

⁸⁷It seems inherently risky for a contract lawyer, or even a contracting officer, to determine prospectively that a defect in an offeror's proposal cannot be corrected or is so inherent in the offeror's proposal that it cannot be corrected without major revisions to the proposal. These are subjective standards, and the ultimate determination will lie with the GAO. In addition, protesters can be very creative in arguing, after the fact, how they would have changed their proposals had they been advised of the defect.

⁸⁸The principle even explains those decisions where the GAO found that the agency had failed to hold meaningful discussions but denied the protest anyway. For the contract lawyer who has responsibility for determining whether an award is proper, the question in this area should be whether the award would withstand GAO scrutiny. These principles, however, cannot explain previously discussed language in such decisions as *Martin Advertising*, 87-1 CPD ¶ 285 and *Metron*, 87-1 CPD ¶ 642; but then, for the reasons discussed at *supra* notes 51-63 and accompanying text, no contract attorney should rely on those decisions in determining whether meaningful discussions have been held.

⁸⁹It should be noted that the principle is deliberately worded to encourage discussions. For instance, it purposely fails to encompass the concept that agencies need not discuss defects that are so integral to an offeror's proposal that they cannot be corrected without a major revision to the proposal because of the author's view that: 1) such a standard is too risky to apply prospectively; 2) any offeror with a defect truly of this nature should have been eliminated from the competitive range; and 3) simply because an agency believes a defect may be difficult to correct does not supply any logical reason not to provide an offeror with the chance to try.

agencies to discuss an offeror's price only if it is considered "unreasonable." If price discussions are compared to technical discussions, it would appear that discussing a cost or price that was "unreasonable" would be equivalent to discussing a technical defect whose correction would require a substantial revision of the proposal, in which case discussions should not be required. Perhaps it would be best simply to consider price discussions as subject to different rules than technical discussions, and leave it at that.

Therefore, contract attorneys, in reviewing a contract file to determine whether adequate discussions have been held, should ask themselves two questions: were the unsuccessful offerors given one reasonable chance to address all of the defects in their initial proposals; and, if not, could the discussion of undiscussed defects have affected the outcome of the procurement?

B. BECOMING INVOLVED IN THE DISCUSSIONS PROCESS

The best way for a contract lawyer to ensure that adequate discussions have been conducted is for the lawyer to get involved *before* the file is sent to the legal office for review. In many instances, by the time the file is sent to the legal office for approval of a proposed award, time constraints effectively prohibit any reopening of discussions.⁹⁰

This problem can be avoided simply by having the lawyer review the proposed discussion questions before they are sent to the offerors, comparing them with the materials that the evaluators generated.⁹¹ Such a procedure could ensure that discussions are meaningful, prevent time-consuming reopenings, and expedite the legal review of the proposed award. Getting the lawyer involved early is particularly important for complex or important negotiated procurements.

⁹⁰"This is particularly true at the end of the fiscal year, when annual appropriations are about to expire. It may also be true, however, where the requirement is urgently needed and the acquisition plan projects award soon after the file is sent to the legal office for review. In addition there are currently proposals in DOD that would make it considerably harder for contracting officers to request multiple BAFO's, further complicating the problem for the contract lawyer who concludes that the contracting officer held inadequate discussions.

⁹¹Actually, some attention should be given to the issue even before this point. The technical evaluators should be made aware of the duty to hold meaningful discussions before they perform their evaluation so that they can accurately point out the areas where discussion is needed. In many cases, evaluation files are returned to the contracting officer with low point scores but no corresponding narrative comments, making it difficult to phrase accurate discussion questions.

C. REVIEWING THE CONTRACT FILE

Once the lawyer becomes involved, whether it is in the formation of the discussion questions or in reviewing the award file, how should the lawyer proceed with the review? In any procurement that results in a protest filed with the GAO, the GAO's attorneys will make the ultimate determination as to whether discussions have been meaningful. If the GAO attorney ultimately will determine whether meaningful discussions have been held, then logically the field contract lawyer, in making that same determination, must review all of the information that would be available to a GAO attorney if a protest is filed. Specifically, the attorney must be prepared to review all of the evaluation materials that have been generated as well as the records of all discussions that have been held.⁹²

In some instances, contract files are sent to the legal office for review with only a summary of the technical evaluation. Lawyers should avoid reviews based only upon such summaries, because the summaries often do not accurately reflect either the narrative comments or ratings of individual panel members. The contract lawyer should, if possible, examine the individual score sheets of each technical evaluator, reading the narrative comments and noting the number of points (or color or adjectival rating) that the evaluator has assigned for each factor. These materials must then be compared with the record of discussions to determine whether the parties discussed all required matters.

If the discussion questions sent to the offerors repeat verbatim all of the concerns that the evaluators expressed (or indicated in their scoring patterns), then the lawyer's task is easy. Such is rarely the case. Suppose the offerors received discussion questions, but it is not immediately obvious that those questions covered all of the concerns that the evaluators raised. In that situation, the lawyer must employ the following analysis to ensure that the proposed contract award is proper.

If the lawyer is having difficulty discerning the scope of the questions asked because of the technical nature of the language used, he should have a meeting with the technical evaluation personnel to have them explain the coverage of the questions. The GAO has been fairly liberal in its interpretation of the scope of discussion questions, often finding that general questions that "lead offerors" into the rel-

⁹²If the evaluation materials are voluminous, as they are in many complicated negotiated procurements, the lawyer should arrange to have the materials available for his inspection at the location in which they are being stored.

evant areas of their proposal are sufficient to put the offeror on notice that the agency has concerns with its proposal, even where the agency fails to notify the offeror of its specific concerns.⁹³

If the lawyer becomes convinced, whether as a result of such a conference or through independent analysis, that the questions asked of the offerors did not legitimately encompass all of the evaluators' areas of concern, then he must move on to the next level of analysis: was it necessary that those areas be discussed? At this point, the lawyer must consider two questions: were the concerns legally required to be discussed; and if so, did the failure to discuss them prejudice the offeror.

The first analysis simply consists of applying the specific exceptions to the discussions requirement. Does the defect first appear in the offeror's BAFO? Or did the offeror take a specific exception to a solicitation requirement? These are the two most objective—and therefore most easily applied—of the GAO's exceptions to the requirement for discussions. Unless the matter falls into one of these two categories, the lawyer should determine whether the offeror was prejudiced by the failure to discuss the matter.⁹⁴

The determination of whether an offeror was "prejudiced" by failing to discuss a particular matter actually rests upon two separate inquiries. The first is whether the defect is of a type that could not be corrected, even if brought to the offeror's attention. If the defect involves something over which the offeror realistically has no control, the failure to discuss it cannot prejudice the offeror. More typically, however, the defect involves something which the offeror could conceivably correct, or at least ameliorate. In that situation, the lawyer must determine whether, had the offeror made such a change to its proposal, the source selection decision could have been affected.

If it becomes necessary, a crude prejudice analysis usually can be performed quite easily. The lawyer should determine which evaluation factors were affected by the areas that were not discussed. The offeror should receive the maximum score for those factors. The

⁹³*See, e.g.*, Automation Management Consultants, Inc., Comp. Gen. Dec. **B-231540** (12 Aug. 1988), 88-2 CPD ¶ 145. Of course, this must be balanced against the standard that discussions must be as specific as practicable. It is always better to ask specific questions pinpointing all of the evaluator's concerns.

⁹⁴Arguing that a matter need not be discussed because it is too "integral" to the protestor's proposal may be necessary after a protest is filed and the lawyer has to defend the integrity of the procurement, but when the lawyer is reviewing the file before award to determine the adequacy of discussions it might be wise to advise that the contracting officer hold comprehensive discussions rather than to later trust the persuasiveness of such an argument.

lawyer should then recompute the offeror's total score based upon this adjustment, and compare it to the proposed awardee's. In many instances it will be readily apparent that the failure to discuss a particular matter did not cause the offeror any competitive harm.⁹⁵ If that is the situation, the lawyer may want to note in the legal review that, although meaningful discussions were not held, the award is legally unobjectionable because the offeror was not competitively prejudiced.

IV. CONCLUSION

Determining whether meaningful discussions have been held in a particular procurement can be a complex and difficult task. The GAO decisions in the area seem contradictory and are therefore of little comfort to the lawyer trying to predict whether a procurement will pass the GAO's review. By paying less attention to specific exceptions whose application is difficult to predict, however, and by paying more attention to the general concepts of prejudice and giving offerors "one bite at the apple," contract lawyers should be able to avoid many of the pitfalls that have in the past awaited agencies conducting negotiated procurements.

⁹⁵However, lawyers should be particularly cautious about making this assessment where the recomputation brings the offeror's score close to the proposed awardee's and the offeror has a lower proposed cost or price. That situation raises the possibility that the contracting officer could find the two offers technically acceptable and, under a clause that is found in many requests for proposals, could then award to the lower-ranked but lower-cost offeror. In general, given the GAO's vagrancies in this area, it would appear to be more prudent to adopt a conservative approach to the prejudice analysis during a preaward review, advising that contracting officers reopen negotiations to discuss the omitted topics whenever time permits.

BOOK REVIEWS

A TIME FOR GIANTS: POLITICS OF THE AMERICAN HIGH COMMAND IN WORLD WAR II*

Reviewed by Major Paul Hill**

Both the serious student of military history and the casual reader of wartime exploits should enjoy *A Time for Giants*, D. Clayton James's anthology of the achievements of eighteen of America's foremost military leaders who rose to the top ranks of power during World War II.

James — noted by some as perhaps the most incisive military historian writing today — gives the reader a tightly woven series of vignettes describing a select group of this country's most legendary heroes during the Second World War. The author employs the same objective academician's approach he utilized in his heralded three-volume biography of General Douglas MacArthur, producing a capsulized yet lively portrayal of each commander that highlights their especially noteworthy activities in the wartime environment of the 1940's.

The subjects of James's work? From the Army and Army Air Corps: Henry H. "Hap" Arnold; Omar N. Bradley; Mark W. Clark; Ira C. Eaker; Dwight D. "Ike" Eisenhower; George C. Kenney; Douglas MacArthur; George C. Marshall; George S. Patton, Jr.; Carl A. "Tooy" Spaatz; and Joseph W. "Vinegar Joe" Stillwell. From the Navy: William F. "Bull" Halsey; Ernest J. King; William D. Leahy; Chester W. Nimitz; and Raymond A. Spruance. And, from the Marine Corps: Holland M. Smith and A. Archer Vandegrift.

The individuals featured in James's work were men of considerable seniority in age, years of service, and time in grade. Upon America's entry into World War II, their average age was **55** (the oldest was **66**; the youngest was **45**). Four reached the statutory retirement age of **64** during the war but were granted extensions of duty by the President. As of December **1941** their average term of service was **35** years. Two

*James, D. Clayton, *A Time for Giants: The Politics of the American High Command in World War II*. New York: Franklin Watts Publishers, 1987. Pages: xvi, 317. Price: \$19.95. Photographs, Abbreviations, Notes, Bibliography, Index. Publisher's Address: 387 Park Avenue South, New York, N.Y. 10016.

**Editor, Developments, Doctrine, and Literature Department (IMA), The Judge Advocate General's School, Charlottesville, Virginia.

officers had retired before the attack on Pearl Harbor, only to be recalled to active duty.

In spite of the relatively long prewar service of this group, most of them had been impeded in rank by a slow promotion system and limited military growth between World Wars I and II. Prior to December 1941 the average time in rank at general or flag level was four years. Yet, since only a few of these officers had even heard a shot fired in anger, how did these generals and admirals attain their prominence without having held any previous battle command? Was their rise to power based on factors other than merit?

A *Time for Giants* attributes the success of these eighteen men primarily to politics, but not the type that is abhorred by most military officers. Instead, the author describes their good fortune in the more classical terms of politics—through the resulting dynamics of relations among men in positions of power and leadership. The author subtitles his book, “The Politics of the American High Command in World War II,” and other reviewers of this work have acknowledged it to be an account of “insider politics during wartime Washington.”

In that environment, service secretaries and military chiefs often found themselves relying upon their own personal knowledge when considering officer assignments—not only in recommending those for high level responsibilities who were already seasoned at lower general or flag officer levels, but also in identifying officers further down the ladder for duties that would prepare them for eventual succession to more important commands.

James also notes that Roosevelt jealously protected his authority as Commander in Chief through direct dealings with his heads of the military services, actively participating in the strategic and operational aspects of the war, and relegating his War and Navy secretaries primarily to administrative duties. Service chiefs usually advised the President on command choices within their respective service. The Joint Chiefs, often through informal concurrence among themselves, decided upon nominees for joint commands. The selection of leaders within the various combined commands was often influenced by a coalition of the Allies involved, but the heads of state were usually brought into the process.

According to James, a form of natural selection appeared to operate within the American wartime command. Some officers responded well to combat challenges while others did not. Consistent with the observations of Clausewitz, wartime afforded a few officers the opportunity to be charmed merely by some chance event—or to be cheated

by it. A *Time for Giants* touches upon the careers of those officers who experienced World War II both ways.

The author adds that, although lacking in order or consistency, the development of an effective command group was further influenced by two other significant factors: 1) the upper level of America's high command was locked in place within a relatively short time after the attack on Pearl Harbor; and 2) the U.S. defeats in early battles with Japan accelerated changes in commands and command structures, removing those incumbent senior officers who had proved less than satisfactory for wartime service, and promoting other promising replacements from within the junior ranks. Moreover, James tells us that subsequent events proved that America's early—yet relatively unsuccessful—enemy confrontations with comparatively smaller U.S. combat units were of lesser influence upon the outcome of the war than were those later campaigns involving greater forces and higher stakes, where solid leadership was crucial.

Whatever its nature, the system that produced the American high command of World War II appears to have demonstrated its true merit by the performance of the officers who served at the top. James's group portrait of those eighteen military stalwarts leaves little doubt that these leaders achieved their positions of prominence by being the better qualified and more successful leaders available for the tasks at the time.

Of special note is the frequency of both personal and professional contacts among these men, which are continuing threads running throughout the fabric of James's book. If not building upon old friendships during various tours of duty, these men constantly criss-crossed each others' careers in the more cramped confines near the top of the command pyramid. By the late 1930's, almost all eighteen were either friends or acquainted with one another in some manner. Additionally, their mere survival of the services' promotion and assignment systems assured them status in an unofficial brotherhood of military wartime elite.

All five of the admirals featured within this work were Annapolis graduates, finishing within seven years of each other. All but three of the eleven Army and Army Air Corps generals were alumni of West Point, and several of them were classmates. The two Marine commanders, from civilian university backgrounds, soon crossed paths within the small corps that existed before the hostilities began.

Each of James's biographical installments provides a convincing portrayal of each officer's humanity, and suggests a distinct basis for their ultimate success in the military and beyond. By the time that

hostilities ended in 1945, seven of these men would hold five-star rank and the other 11 would be four-star officers, with two of them subsequently attaining a fifth star.

All eighteen showed remarkable versatility in their leadership abilities in the postwar era as well. Except for those who died or were restricted by ill health, all went on to key roles in both the military and civilian arena, serving with distinction as service chiefs, chairmen of the Joint Chiefs of Staff, as administrators, educators, executives, and in high governmental positions which extended to the presidency.

A *Time for Giants* is an excellent introduction to the cast of leading characters who successfully conducted America's involvement in World War II. Some of James's special touches include the manner in which he weaves his narrative sketches into the wartime backdrop and correlates each biography with the other, highlighting the interrelationships among nearly all these heroes. The book contains a helpful glossary of abbreviations and is well footnoted. Maybe best of all, James's condensed vignettes generate in the reader a curiosity to research other detailed accounts of each subject's life works and service record—and the author provides extensive bibliographic references for such follow-up.

Other reviewers have termed this work possibly the most intimate group sketch of America's war heroes to date. Without question, D. Clayton James has crafted an enjoyable historical chronicle and a splendid book.

FEDERAL PROCUREMENT REGULATIONS — POLICY, PRACTICE AND PROCEDURES*

Reviewed by Major Paul W. Schwarz**

Practicing contract lawyers and scholars alike will find Jim Nagle's book to be an enduring and authoritative source on the development of federal procurement law. Exceptionally well written, the reader is given a straightforward explanation of the nature of procurement regulations — why they are there, what they are, and how they operate. The progress of procurement is traced from the Revolutionary War to the present. The importance of this development is critical to understanding the legal basis of current acquisition law. Of more everyday interest is the description of the roles of the Comptroller General and of the Armed Services Procurement Regulation Committee, which of course provides insight into the present Federal Acquisition Regulation Council. The relationships among the statutes, the regulations, and the case law are compared from the viewpoint of the practical importance of these distinctions to the practitioner and of course the client.

Jim Nagle originally wrote this book as an S.J.D. dissertation for George Washington University, and the American Bar Association accepted the book for publication because of its outstanding contribution to this body of law. The constitutional doctrine of delegation of legislative authority, and the inherent authority of the executive branch to manage its internal affairs is explained along with the tests to determine the juridical status of the regulations. Of particular value is the topic of regulations in litigation, including how regulations may be interpreted, standing to challenge regulations, and how violations of regulations may be treated.

The author, James F. Nagle (Lieutenant Colonel, Judge Advocate General's Corps), is presently the Chief, Logistics and Contract Law Branch, Contract Law Division, Office of The Judge Advocate General. He is well known throughout procurement legal circles from his prolific writing, frequent lectures, and participation in professional associations. His broad experience and extensive academic knowledge have combined to produce a substantial contribution to the body of government contract law.

*American Bar Association General Practice Section, *Federal Procurement Regulations—Policy, Practice and Procedures*. Chicago, Illinois: ABA Press, 1987. Price: \$79.95.

**Judge Advocate General's Corps, United States Army. Major Schwarz is assigned to the Contract Law Division, Office of The Judge Advocate General, Washington, D.C.

With over 1,900 citations to court, board, and Comptroller General decisions, this text is also an excellent place to begin research into the various areas of discussion. I predict that this volume will assume its rightful place in most contract law libraries alongside such classics as Nash and Cibinic's *Federal Procurement Law*, where it will perform years of duty as an authoritative reference tool.

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